No. 97-1472-CFX Title: Michael A. Haddle, Petitioner
v.
Jeanette G. Garrison, et al.

Docketed: March 10, 1998 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Mar 5 1998	Petition for writ of certiorari filed. (Response due April 9, 1998)
	Mar 30 1998	Waiver of right of respondent Dennis J. Kelly to respond filed.
	Apr 8 1998	Brief of respondent G. Peter Molloy in opposition filed.
	Apr 9 1998	Brief of respondents Jeanette Garrison, HLM, Inc. and Christopher Garrison in opposition filed.
	Apr 22 1998	DISTRIBUTED. May 14, 1998
	May 18 1998	REDISTRIBUTED. May 21, 1998
	May 26 1998	Petition GRANTED. SET FOR ARGUMENT November 10, 1998. **********
	Jun 24 1998	Order extending time to file brief of petitioner on the merits until July 24, 1998.
	Jul 20 1998	Motion of respondents to dismiss writ of certiorari as improvidently granted filed.
	Jul 24 1998	Motion of Lawyers Committee for Civil Rights Under Law for leave to file a brief as amicus curiae filed.
	Jul 24 1998	Opposition of petitioner to motion of respondents filed.
	Jul 24 1998	Joint appendix filed.
	Jul 24 1998	Brief of petitioner Michael Haddle filed.
	Jul 24 1998	Brief amicus curiae of United States filed.
	Jul 24 1998	Brief of petitioner in reply to motion to dismiss filed.
	Jul 24 1998	Motion of National Whistle-Blower Center for leave to file a brief as amicus curiae filed.
	Jul 27 1998	Motion of National Employment Lawyers Association, et al. for leave to file a brief as amici curiae filed.
	Aug 13 1998	Motion of respondents to dismiss writ of certiorari as improvidently granted DENIED.
	Aug 14 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 27 1998	Brief of respondents Jeanette Garrison, HLM, Inc. and Christopher Garrison filed.
	Aug 27 1998	Brief of respondent G. Peter Molloy, Jr. filed.
	Sep 9 1998	Motion of Lawyers Committee for Civil Rights Under Law for leave to file a brief as amicus curiae GRANTED.
	Sep 9 1998	Motion of National Employment Lawyers Association, et al. for leave to file a brief as amici curiae GRANTED.
	Sep 9 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Sep 9 1998	Letter from respondent Dennis Kelly received.
	Sep 11 1998	Record filed.
	Sep 14 1998	Record filed.
	Sep 28 1998	CIRCULATED.

No. 97-1472-CFX

Entry	Date	Proceedings and Orders
	Sep 28 1998	Reply brief of petitioner Michael Haddle filed.
	Oct 5 1998	Motion of National Whistle-Blower Center for leave to file a brief as amicus curiae GRANTED.
	Nov 9 1998	Supplemental brief of respondent Jeanette Garrison and Christopher Garrison filed.
	Nov 10 1998	ARGUED.

Supreme Court, U.S.
FILED

(1)

971472 MAR 5 1998

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

vs.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED FOR REVIEW

Is loss of "at will" employment compensable damages under 42 U.S.C. § 1985(2)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption hereof.

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STATUTES

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Petitioner, Michael A. Haddle, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

REPORTS OF OPINIONS

Neither the opinion of the United States Court of Appeals for the Eleventh Circuit in this proceeding, nor that of the United States District Court for the Southern District of Georgia in the proceeding has been reported.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Eleventh Circuit in this matter was entered on December 5, 1997. Its Judgment was filed the same day. There was no application for re-hearing. This Court has jurisdiction to review this Judgment by writ of certiorari by reason of 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The petition involves only the construction of 42 U.S.C. § 1985 (2) and the concluding portion of §1985 (part of §1985(3)), the verbatim text of which is as follows:

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending

such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

. . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein thereon do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

In 1994 and early 1995, Petitioner Michael A. Haddle ("Haddle"), plaintiff in the District Court below, had a management level job with Respondent Healthmaster, Inc. ("Healthmaster"), a home health care company which received most of its revenues from Medicare

reimbursement. Healthmaster was controlled by its President, Respondent Jeannette G. Garrison ('Garrison"), who together with her husband owned all the stock of the company. Haddle did not have an employment contract. He was employed "at will", meaning that under state law he could be discharged by his employer at any time, without cause.

In 1994, the U.S. Government began a far-reaching investigation of Healthmaster and Garrison, which resulted in the indictment of Healthmaster, Garrison and others in March of 1995 on charges of Medicare fraud and other crimes (the "Criminal Case"). Subsequently, as part of a plea bargain, Garrison pleaded guilty to some of these charges and repaid the Government in excess of $11,000,000. She is now serving a federal criminal sentence. Charges against Healthmaster were dropped as part of this plea bargain.

Haddle cooperated with this investigation during 1994 and 1995. His cooperation was known to Garrison and others at Healthmaster, including its in-house counsel, Respondent J. Peter Molloy ("Molloy"). Garrison was heard to vow that if anyone testified against her, he would be "destroyed". Further, in January of 1998, Robert Pittard, the director of human relations at Healthmaster, was present during a conversation between Garrison and Molloy, at which Garrison and Molloy specifically discussed retaliation against Haddle for his cooperation with the Government and his expected grand jury and trial testimony. Garrison and Molloy discussed in Pittard's hearing how they could safely retaliate against Haddle. Fearing that the Government would object to retaliation against one of its witnesses, they devised a plan to bring in an outside person to perform some of Haddle's

functions, so that it would appear that his job had become redundant.

After the indictment of Healthmaster and Garrison, the Health Care Financing Agency refused to continue Medicare reimbursement payments to Healthmaster. In order to save the company's business, Garrison had the operating part of the business transferred to a subsidiary, Healthmaster Home Health Care, Inc., which was placed under the protection of Chapter 11 of the Bankruptcy Code. This subsidiary then obtained an injunction from the Bankruptcy Court which effected the resumption of Medicare reimbursement payments. As part of this process, Garrison and Healthmaster were barred from any participation in the management of the subsidiary, Healthmaster Home Health Care, Inc.

Under Chapter 11, Healthmaster Home Health Care, Inc. was placed under the supervision of a Trustee, who had the sole authority to hire and fire. Shortly before the bankruptcy, Garrison had installed Molloy as President of the subsidiary, at a very large increase in salary. The Trustee retained Molloy as President of the company and, initially, retained Haddle in his position. However, Molloy recommended to the Trustee that Haddle be fired, asserting that an outside person had been brought in to perform Haddle's functions, rendering him redundant, and further that Medicare would not reimburse his salary. These statements were untrue. The Trustee discharged Haddle solely on Molloy's recommendation, without making any independent investigation.

The foregoing statement of facts takes as true the allegations of Haddle's complaint. As to the results of the Criminal Case, Garrison's vow to destroy those who

cooperated with the Government, what Pittard heard Garrison and Molloy say in plotting their conspiracy, and how Molloy persuaded the Trustee to fire Haddle, it is also based on the testimony given at trial in the companion case of O'Neal v. Master Health Plan, Inc., Case No. 96-028, in the United States District Court for the Southern District of Georgia. In that case, another company also controlled by Garrison was charged with having fired the plaintiff O'Neal in retaliation for his cooperation with the same government investigation that resulted in the Criminal Case. In the O'Neal case, the District Judge allowed testimony concerning Haddle's discharge. Rejecting the contention that this evidence should not have been admitted in the O'Neal case, the District Judge commented that

> "While it is true that Haddle worked for another of Garrison's companies, the manner in which he was discharged was sufficiently similar to O'Neal's discharge to allow the introduction of evidence of Haddle's termination. Haddle was a high ranking official in a health care company owned and managed by Garrison and claims that he was terminated after refusing to comply with corporate practices that he believed to be illegal. (Trial. Tr. at 160 (direct testimony of Haddle).) [footnote omitted]. Evidence of his termination was introduced by O'Neal in order to show that Garrison, acting through her closely-knit health care organizations, would terminate or have terminated high ranking officials in retaliation for legal conduct that she found objectionable. Haddle's termination clearly was similar in nature to O'Neal's termination, and showed

that Garrison had the intent and motive to engage in a systematic plan or scheme to rid the ranks of her executives who posed a threat to her illegal activities. (Trial Tr. at 138-40 (Haddle's testimony).)"

- Order, O'Neal v. Master Health Plan, Inc., Case No. 96-028 in the United States District Court for the Southern District of Georgia, pp. 16-17, June 30, 1997.

The O'Neal case resulted in a jury verdict and judgment in favor of the plaintiff, which is now on appeal to the United States Court of Appeals for the Eleventh Circuit as Case No. 97-8842. This information is provided to illustrate what Haddle would have proved herein had his case not been dismissed on motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as complained of herein.

Haddle brought this action under 42 U.S.C. 1985(2) against Garrison, Healthmaster, Molloy, and Respondent Dennis Kelly ("Kelly") (an associate of Garrison's and an officer of Healthmaster, who is also now serving a federal prison sentence upon his conviction for Medicare fraud arising out of the same investigation), alleging that these defendants conspired to bring about Haddle's discharge by deceiving the Trustee, in order to effectuate retaliation against Haddle.

Haddle admitted that he was an "at will" employee under state law and that his only damages were the loss of his job. The District Court dismissed the case on the authority of Morast v. Lance, 807 F.2d 926 (11th Cir. 1987), which holds that loss of "at will" employment cannot

be cognizable damages under 42 U.S.C. 1985(2). The District Court did not reach any other issue or defense.

Haddle was employed by Healthmaster until April 13, 1995. From that date until his discharge, Haddle was employed by Healthmaster Home Health Care, Inc. On March 8, 1995, a federal grand jury indicted Garrison, Healthmaster, Kelly and others for Medicare fraud and related charge in the Criminal Case. On March 8, 1995, Haddle had cooperated with the investigation in the Criminal Case and had appeared pursuant to subpoena to testify before the grand jury, although his testimony was not actually taken due to the press of time. On June 21, 1995, after Garrison, Kelly and Healthmaster had become aware that Haddle would appear as a witness at trial in the Criminal Case, Molloy, who (the complaint alleges) acted in this matter at the direction of Garrison and Kelly and pursuant to a prior understanding and agreement for this purpose, caused Haddle to be terminated by the Trustee from his employment at Healthmaster Home Health Care, Inc. The complaint further alleges that these defendants made this decision for the purpose of retaliating against Haddle for his cooperation with federal agents and his appearance to testify at the federal grand jury and in order to intimidate him and others from cooperating and testifying in the Criminal Case.

Haddle will show, as was shown in the companion case above referenced, that Molloy was hand-picked by Garrison to operate Healthmaster Home Health Care, Inc. and that the reason Molloy gave to the Trustee in bankruptcy for terminating Haddle was neither the true reason or nor even the reason Molloy gave other persons, including the State of Georgia when responding to

Haddle's claim for unemployment compensation. In short, the Trustee was hoodwinked.

ARGUMENT

42 U.S.C. §1985(2) provides a civil remedy for the victim of a conspiracy "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . ." 42 U.S.C. §1985(2). Notwithstanding this broad language, the Court of Appeals for the Eleventh Circuit ruled in Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) that a federal witness, who is the victim of a successful conspiracy to have him fired from his job in retaliation for his testimony has no cognizable damages under this statute, if his job was one which was terminable by his employer "at will". The Court of Appeals followed this precedent in this case, applying it even in this suit which is not against Haddle's employer, but rather against third parties who conspired to cause his employer to fire him. It did so even though Georgia law is clear that an employee has a "property right" in his at will employment (although not a right assertable under state law against the employer itself). Troy v. Interfinancial, Inc., 320 S.E.2d 872, 877 (Ga. App. 1984), cert denied. See also Favors v. Alco Mfg. Co., 367 S.E.2d 328, 332 (Ga. App. 1988) (at will employee has "valuable contract right" in his at will

employment).[1] The Eleventh Circuit thus stripped the protection of the statute from those most vulnerable and most in need of it: employees who hold their livelihood "at the will" of their employers, so that those against whom they testify have only to persuade their employers to discharge them from their precarious employment, in order to inflict tremendous injury.

The Court of Appeals reached this perverse conclusion in Morast v. Lance as one of three alternative holdings, any one of which would have sustained its judgment. It stripped at will employees of this vital protection almost casually and as an aside, with virtually no citation of authority or expressed reasoning. What the Court of Appeals did say in Morast v. Lance shows that it failed to distinguish between actions under Section 1985(3) and those under Section 1985(2), a distinction carefully made by this Court in Kush v. Rutledge, 460 U.S. 719 (1983).

The effect of this holding is that a witness in a federal criminal proceeding, who is protected against being interfered with or retaliated against by a specific provision of federal law, 42 U.S.C. §1985(2), has no federal remedy if he is fired from his job for being a witness, if his employment is terminable "at-will" under state law. 42 U.S.C. Section 1985(2), a portion of the Civil Rights Act of

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[1] "(T)he rights that Congress sought to protect in the Act of 1871 [now 42 &.S.C. §1985] were described by the chairman of the House Select Committee that drafted the legislation as 'the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . .'" Lynch v. Household Finance Corp., 405 U.S. 538, 545 (1972) (emphasis supplied).

1871 which was passed expressly to give a remedy to those injured by intimidation and retaliation for exercising their federal right and duty to give evidence in federal court proceedings, is thus rendered of no effect to remedy this most serious and most likely of harms. This seriously affects the integrity of the federal judicial system and the administration of federal law.

All employee should be protected from retaliatory loss of his job by 42 U.S.C. §1985(2). Haddle, like every other worker in America, is protected by federal law against being intimidated or retaliated against, in his employment or otherwise, for exercising a federal right. To hold otherwise would be to upset one of the clearest and best established principles of civil rights law. Where an employee is discharged for a federally proscribed reason, such as to intimidate and retaliate against him for testifying in a federal court proceeding, he does have a legally cognizable injury.

Testifying in a federal trial is a right protected under the United States Constitution. Absent this right, "the foundations of federal justice would be undermined." United States v. Thevis, 665 F.2d 616, 626 (5th Cir. Unit B, 1982), quoting United States v. Pacelli, 491 F.2d 1108, 1113 (2d Cir. 1974), cert. denied, 419 U.S. 826 (1974).

On this issue, there is a clear conflict between United States Courts of Appeals. The United States Court of Appeals for the Ninth Circuit has held that an at will employee can sue for loss of his job under 42 U.S.C. Section 1985(2):

> Section 1985(2) contains two clauses that give rise to separate causes of action. The

> first clause concerns access to *federal* courts, giving rise to a cause of action where two or more persons in any State or Territory conspire [A] to deter, by force, intimidation, or threat, any party or witness *in any court of the United States* from testifying to any matter pending therein, freely, fully and truthfully, or [B] *to injure such party or witness in his person or property on account of his having so attended or testified . . .*
>
> As to the denial of access to federal courts, the complaint alleges that the defendants acted and conspired to retaliate against plaintiff for seeking legal redress for violations of his civil rights in the courts of the United States.
>
> The retaliation allegedly took many forms, culminating in his termination.
>
> . . .to make out a claim based on retaliation under the first clause of section 1985(2), a plaintiff must prove four elements: (1) a conspiracy by the defendants; (2) to injure a party or witness in his or her person or property; (3) because he or she attended federal court or testified in any matter pending in federal court; (4) resulting in injury or damages to the plaintiff. 42 U.S.C.§1985(2); *cf. Chahal v. Paine Webber, Inc.*, 725 F.2d 20, 23 (2d Cir. 1984) (setting out elements for witness intimidation under §1985(2)).

The district court dismissed Portman's complaint on the basis of the second and fourth elements, concluding "a cause of action for denial of access to the courts was not meant to provide a remedy for repercussions such as a salary denial or termination." We disagree with this conclusion. Although this court has not addressed the question, other circuits have concluded that plaintiffs who `have proved that they were denied [employment opportunities as a result of a conspiracy] because they previously had instituted legal actions to vindicate their federal rights' have made out claims under section 1985, even where they had no constitutionally protected property interest in the job. *See Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983); *see also Wright v. No Skiter Inc.*, 774 F.2d 422 (10th Cir. 1985) (plaintiff alleging that the defendants conspired to defeat his low bid for a contract in retaliation for his bringing a federal suit states a claim under §1985(2)). As the court in Irizarry explained, "'[p]roperty here must include any economic damage that would be recognized in an ordinary tort suit.'" *Id.* We see no reason to depart from the approach of those cases, and conclude that the district court erred in dismissing the claim on this basis.

- Portland v. County of Santa Clara, 995 F.2d 898, 909-910 (9th Cir.1993).

Similarly, in Irizarry v. Quiros, 722 F.2d 869 (1st Cir. 1983), the court affirmed a judgment in favor of various farm workers who proved that they had been denied reemployment because they previously had instituted legal actions to vindicate their federal rights. The First Circuit reasoned: "Defendants' conduct was obviously designed to intimidate and deter, and plaintiffs clearly were 'injured' in their 'person or property.' 'Property' here must include any economic damage that would be recognized in an ordinary tort suit." Id. at 871.

This Court has recognized that an action under Section 1985(2), such as this, is favored and should not be subject to the constraints that govern actions relating to deprivations under color of state law such as are addressed by Section 1985(3). Kush v. Rutledge, 460 U.S. 719 (1983). In Kush, plaintiffs had brought an action under Section 1985(2) alleging that certain parties had "engaged in a conspiracy to intimidate and threaten various material witnesses in order to prevent them from testifying "freely, fully and truthfully" in his lawsuit in federal court. 460 U.S. at 721. The Court of Appeals distinguished those parts of the Civil Rights Act of 1871 relating to "obstruction of justice at the state level," from others relating to "interference with federal litigation," noting that the latter are "institutionally linked to federal interests." 460 U.S. at 772, 725. The Supreme Court upheld the Court of Appeals in its determination that, where intimidation of federal witnesses is involved, the statute does not require race or class based animus, as it does in other actions such as those alleging intimidation in state court proceedings or other contexts, emphasizing the more direct federal interest in protecting federal witnesses. The case signaled the Supreme Court's view that actions under Section 1985(2) should be given a much broader construction than actions

under Section 1985(3), in order to vindicate and protect the important and unique federal interest in the right of citizens to take part and cooperate in cases pending in federal courts.

The Eleventh Circuit in Morast v. Lance disposed of the at will employee's Section 1985(2) claim in three sentences:

> "Finally, to make out a cause of action under Section 1985(2), the plaintiff must have suffered an actual injury. Because Morast was an at will employee . . . [citation omitted], he had no constitutionally protected interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute."
>
> –807 F.2d at 930 (emphasis supplied)

It appears that the Eleventh Circuit failed to consider a difference between an action under subsection 3 of Section 1985 and subsection 2 thereof, as expressed by this Court in Kush v. Rutledge. The issue in interpreting Section 1985(2) is not what is a "constitutionally protected" interest, but rather merely what the reach of this federal statute, enacted to protect the integrity and operation of the federal courts, is under its own wording.

To attempt to reconcile the holding of Morast v. Lance, as applied by the Eleventh Circuit in this case, with the explicit holding of the Ninth Circuit in Portland, or with the reasoning of the First Circuit in Irizarry, presents a very stark issue: Is a federal witness, whose person and

property are protected from interference by Section 1985(2), still subject to being fired from his job with impunity, so long as he is an at-will employee?

An at will employee, who holds his job at the mercy of his employer, cooperates as a federal witness before a federal grand jury in a federal investigation of criminal conduct by his former employer and officers of his former employer. In response, these persons successfully conspire to have him discharged from his at will employment in retaliation for his cooperation with the government, his appearance to testify before the grand jury and his expressed intention to testify at the criminal trial. They are able to do this because one of them is in effective control of the witness's present employer. Their conspiracy is evidenced by direct testimony. Yet the Eleventh Circuit has ruled that this witness has no remedy under federal law for violation of his federal right by these persons, because his employment was terminable at will under state law. The Ninth Circuit has decided to the contrary. The First Circuit clearly would decide to the contrary. This Court should resolve this conflict in favor of protection of federal witnesses and the integrity of the administration of justice in the federal courts, in line with the purpose and wording of 42 U.S.C. §1985(2).

Respectfully submitted,

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 5, 1997

No. 96-9072

D. C. Docket No. 96-00029-CV-1 (AAA)

MICHAEL A. HADDLE,

Plaintiff-Appellant,

versus

JEANETTE G. GARRISON, DENNIS KELLY,
G. PETER MOLLOY, JR., HEALTHMASTER, INC.,
CHRISTOPHER GARRISON, individually and as
Trustee of certain trusts,
JOHN DOES, 1 Through N, individually and
as Trustees of certain trusts,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Georgia

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(December 5, 1997)

Before COX and BARKETT, Circuit Judges, and HUNT,* District Judge.

PER CURIAM:

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*Honorable Willis B. Hunt, Jr., U. S. District Judge for the Northern District of Georgia, sitting by designation.

Michael A. Haddle appeals following the district court's dismissal of his 42 U.S.C. § 1985(2) claim for failure to state a claim. We conclude that Haddle's arguments on appeal are foreclosed by this court's decision in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987). The judgment of the district court is therefore affirmed.

AFFIRMED.[1]

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[1] No member of this panel nor other judge in regular active service on the court has requested that the court be polled on Haddle's Suggestion of Hearing En Banc. See Fed.R.App.P. 35; 11th Cir.R. 35-5. Therefore, Haddle's Suggestion of Hearing En Banc is denied.

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA DATED JUNE 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, CIVIL ACTION	:	
Plaintiff,	:	
v.	:	
JEANETTE G. GARRISON, DENNIS KELLY, G PETER MOLLOY, JR., HEALTHMASTER INC., a Georgia Corporation, CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,	:	
Defendants.	:	NO. CV196-29

ORDER

Plaintiff, Michael A. Haddle, has brought the current litigation seeking damages under Section 1985(2) of Title 42 to the United States Code, and state law. Presently before the Court are four motions to dismiss for failure to state a claim upon which relief can be granted under Rule

12(b)(6) of the Federal Rules of Civil Procedure. These motions have been filed by Defendants, Jeanette G. Garrison (DKT. # 21), Healthmaster, Inc. (DKT. # 23), Christopher Garrison (DKT. # 26), and G. Peter Molloy, Jr. (DKT. # 44). For the reasons stated below, Defendants' motions will be **GRANTED.**

FACTS

Haddle is a former employee of Healthmaster Home Health Care, Inc. He claims that he was improperly discharged from his employment by Defendants in an attempt to deter his participation as a witness in a Federal criminal trial. At the times relevant to this litigation, Haddle concedes that he was an at-will employee.

DISCUSSION

I. Rule 12(b)(6)

Rule 12(b)(6) permits a defendant to move to dismiss a complaint on the grounds that the plaintiff has failed to state a claim upon which relief can be granted. A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true. Jackson v. Okaloosa County Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). A court should not dismiss a complaint for failure to state a claim unless it is clear that the plaintiff can prove "no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80

(1957).; See also Blackston v. State of Alabama, 30 F.3d 117, 119 (11th Cir. 1994)(citing, Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)).

II. 42 U.S.C. § 1985(2)

Section 1985(2) grants a private cause of action for injuries when:

> [T]wo or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . .

In the case at bar, Haddle assets that he can maintain an action under Section 1985(2) despite the fact that he was defined as an at-will employee during the term of his employment. This is directly contrary to binding precedent of the Eleventh Circuit. Case law states:

> [T]o make out a cause of action under §1985(2) the plaintiff must have suffered an actual injury. Because [Plaintiff] was an at-will employee . . . he has no constitutionally protected interest in continued employment. Therefore, [Plaintiff's] discharge did not constitute an actual injury under this statute.

Morast v. Lance, 807 F.2d 926, 930 (11th Cir. 1987). Given the clear language of Morast, the Court is required to **DISMISS** Haddle's claim under Section 1985(2).

III. State Law Claims

Haddle has also alleged numerous state law claims against Defendants. Since the federal issue pending in this litigation has been disposed, the Court believes that the remaining state law issues should be left to the courts of Georgia. The Court declines to retain discretionary supplemental jurisdiction over the remainder of this case. See 28 U.S.C. § 1367 (c)(3).

CONCLUSION

The Court has determined that, under Rule 12(b)(6) Haddle has failed to state a federal claim upon which relief can be granted. His claim under section 1985(2) is **DISMISSED** with respect of the above named Defendants.[2] Additionally, all state law claims are **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED, this 25 Day of June, 1996

S/S Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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[2] Haddle's claims against Dennis Kelly and the unnamed John Does cannot be dismissed, as a motion requesting such action has not been filed.

Supreme Court, U.S.
FILED
APR 8 1998
CLERK

(2)

NO. 97-1472

In The
Supreme Court of the United States

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

vs.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC. CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals for the Eleventh Circuit

RESPONDENT G. PETER MOLLOY'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

1. Course of Proceedings and Disposition of the Court below.

Petitioner Haddle filed an action in the District Court for the Southern District of Georgia asserting one federal claim under 42 U.S.C. Section 1985(2) and several state law claims against Respondents Jeanette Garrison, Healthmaster, Inc. (n/k/a "HLM"), G. Peter Molloy, Dennis Kelly and others. Respondents Garrison and HLM filed Motions to Dismiss which Respondents Molloy and Kelly joined. The District Court dismissed Haddle's 42 U.S.C. Section 1985(2) claim under the binding precedent of the Eleventh Circuit's holding in Morast v. Lance, 807 F.2d 926, (11th Cir. 1987). The District Court also dismissed Haddle's state law claims without prejudice after declining to exercise supplemental jurisdiction over them. Haddle appealed to the United States Court of Appeals for the Eleventh Circuit which issued an opinion and judgment adverse to him on December 5, 1997. Haddle timely filed a Petition for a Writ of Certiorari to this Court.

Respondent Molloy's Response to Petitioner's Statement of Facts.

1. Statement of Facts

From September 22, until 1986 until approximately April 13, 1995 Haddle was an employee of HLM. On March 8, 1995, Garrison, HLM and others, but not Molloy, were indicted in the United States District Court

for the Southern District of Georgia. In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), a wholly owned subsidiary of HLM filed for protection under Chapter 11 of the Bankruptcy Code. In connection with the bankruptcy proceeding, most of the employees of HLM, including Haddle and Molloy, transferred their employment to HHHC. The Bankruptcy Court appointed a Trustee to oversee the affairs of HHHC. The Bankruptcy Court-appointed Trustee elected to retain Respondent Molloy as the President of HHHC.

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Haddle alleges that he cooperated with federal agents. Haddle was subpoenaed to go before the grand jury but admits that he did not testify due to the press of time. Haddle does not allege that he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges that he was to be a potential witness in the criminal case against others.

On June 21, 1995, Molloy, then president of HHHC, with the approval of the Bankruptcy Trustee, terminated Haddle's employment with HHHC. Haddle alleges that Molloy terminated Haddle's employment on the instructions of Jeanette Garrison, Kelly, and HLM in retaliation for Haddle's purported cooperation in the criminal investigation and in an attempt to intimidate Haddle from testifying in the federal criminal trial against others.

2. **<u>The Testimony of Robert Pittard is not in the record below.</u>**

Petitioner Haddle refers extensively in his brief to certain testimony of Robert Pittard, a witness who alleges he overheard conspiratorial conversations between Garrison and Molloy about wrongfully terminating Haddle. However, Pittard's testimony is not a part of the record below in this case. Pittard submitted an affidavit after judgment had been entered in the District Court and while the case was on appeal to the Eleventh Circuit Court of Appeals. Haddle admitted in his brief to the Eleventh Circuit that the Pittard affidavit was not in the Record because discovery had been cut short by the District Court's order granting Respondents' Motions to Dismiss. Respondents objected in their briefs to the Eleventh Circuit to Haddle's use of testimony that was outside the record on appeal.

Haddle's counsel brought a separate action in the United States District Court for the Southern District of Georgia on behalf of John O'Neal, an employee of another company owned by Respondent Garrison. O'Neal charged that Respondents Garrison, HLM, Molloy and others wrongfully conspired to terminate his employment.

As Haddle states in of his brief, Pittard did testify at the O'Neal trial. However, Haddle fails to disclose that Pittard testified that he had previously represented HLM at Haddle's appeal for unemployment benefits. At that hearing, Pittard testified <u>under oath</u> to the hearing

officer that Haddle had been terminated because he had disclosed confidential company documents to a third party. [Tr (Vol 3): 35] Pittard did not say anything to the hearing officer about Haddle being terminated in retaliation for cooperating with the Government. [Tr (Vol 3): 35] Pittard also acknowledged in his trial testimony that he had had a serious disagreement with Garrison when Garrison and Molloy caught him paying a contractor $3,200 and taking back a $1,000 kickback. [Tr (Vol 3): 37&38] Pittard admitted that he had written a company check to the contractor for $3,200, accompanied the contractor to the bank, and after the contractor cashed the check, he had instructed the contractor to give him back $1,000. The contractor did so. [Tr (Vol 3): 37 & 38]

3. **The O'Neal v. Master Health Plan, Inc. companion case is not in the record below.**

Petitioner Haddle refers to the companion case of O'Neal v. Master Health Plan, Inc. for further proof of his allegation that Respondents Garrison, Molloy and Kelly conspired to wrongfully discharge another employee (O'Neal) in the same manner in which Respondents conspired to wrongfully terminate Haddle. However, none of the O'Neal material is in the record below.

Assuming, however, that this Court chooses to consider the O'Neal case, it does not support Haddle's allegations against Respondent Molloy. Instead the O'Neal case supports Respondent Molloy because the trial court granted judgment as a matter of law to

Molloy on the claim that Molloy had been involved in terminating O'Neal's employment. Trial Judge Alaimo expressly ruled:

> Well, I do not know of any evidence that tied him [Molloy] into the discharge or the placing on administrative leave. So I am going to grant that motion. ... He was just purely a message carrier. Under the evidence that I have heard here, that is all he was. ... There is no evidence whatever that he participated in the employment decision to discharge him or put him on administrative leave. [Tr (Vol 3): 215-216].

The O'Neal case is not proof that Respondent Molloy engaged in a conspiracy to injury Haddle or O 'Neal. The case is a factual finding by the District Court Judge that Respondent Molloy did not engage in any wrongful conduct.

SUMMARY OF ARGUMENT

The Morast Court properly applied Kush v. Rutledge because it did not interpret Kush to require Petitioner to allege class-based animus in order to state a cause of action. The Morast Court recognized that Petitioner alleged a conspiracy to obstruct justice in the federal court rather than in a state court.

Section 1985(2) protects parties to federal litigation, not witnesses. The two main decisions cited by Petitioner, Portman v. County of Santa Clara and Irizarry v.

Quiros, both involve injuries to parties to federal proceedings. Section 1985(2) protects a federal litigant from being hampered in presenting an effective case.

Petitioner's at-will employment was not protected by Section 1985(2). Under Georgia law an employee has no right or expectation in continued employment. Therefore, an at-will employee has no constitutionally protected right of employment.

Petitioner has adequate state law causes of action which he plead. These state law rights were created to protect a person's state property interests.

ARGUMENT

1. The Morast Court properly applied Kush v Rutledge.

Contrary to Petitioner's argument, Kush did not signal a view that actions under Section 1985(2) should be given a much broader construction than actions under Section 1985(3).

As codified at the time of the Kush decision, the first part of Section 1985(2) proscribed interference with witnesses in federal courts and the second part of Section 1985(2) applied to conspiracies to obstruct the course of justice in state courts.

Kush held that the plain reading of the second part of Section 1985(2), which pertains to conspiracies to obstruct justice in state courts, contains an equal protection requirement that the first part of

Section 1985(2), which pertains to conspiracies to obstruct justice in the federal courts, did not contain. The difference in the two requirements was the Federal Court's authority and interest in protecting the processes of its own courts and an absence of any need to limit the first part of Section 1985(2) to avoid creating a general federal tort law. Kush v. Rutledge, 460 U.S. at 723.

The Eleventh Circuit properly interpreted the first part of Section 1985(2) because it did not require Petitioner Haddle to allege class-based animus in order to state a cause of action.

2. Petitioner is not a proper party to raise a claim under Section 1985(2).

Petitioner cites Portman v. County of Santa Clara, from the Ninth Circuit, and Irizarry v. Quiros, from the First Circuit, in support of his contention that Morast is wrongly decided. However, the Portman and Irizarry decisions are not helpful to Petitioner. Both these decisions involved injury to an underlying party in a federal proceeding. Petitioner was not a party in the underlying federal criminal case, he was only a witness. Section 1985(2) protects only parties to federal court proceedings.

The Ninth Circuit made absolutely clear this requirement of injury to a party in an underlying action in David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987). In David, the Section 1985(2) plaintiff claimed she had been discharged from employment

because she acted as a witness in a separate federal court proceeding to which she had not been a party. The Court stated as follows:

> David has not alleged how she has been injured by her testimony in Parodi or her failure to appear in court. Allegations of witness intimidation under Section 1985(2) will not suffice for a cause of action unless it can be shown the litigant was hampered in being able to present an effective case. Id. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under Section 1985(2). 820 F.2d at 1040.

The Seventh Circuit has adopted the same position. In Rylewicz v. Beaton Service, Ltd., et al., 888 F.2d 1175, at 1180 (7th Cir. 1989), citing Rode v. Dellarciprete, 845 F.2d 1195, (3rd Cir. 1988) and David, supra, the Seventh Circuit held:

> . . .remedial Sections 1985(3) and 1986 have been held to give monetary relief only to a "party" and not a mere witness such as Mr. Cummings.

But see Brewer v. Rockwell International Corp., 40 F.3d 1119, 1125 (10th Cir. 1994) for a contrary position.

Even Kush involved a plaintiff who alleged that Defendants conspired to intimidate his potential witnesses in a federal lawsuit.

Petitioner was not a party to the underlying federal criminal case against Jeanette Garrison, HLM and Kelly upon which Appellant bases his Section 1985(2) claim. Unlike the plaintiffs in Irizarry and Portman, Appellant was only a witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was not injured. Only parties have standing under the First, Seventh, and Ninth Circuits' approach to the issue because it is the interest in being able to fully litigate a party's case in the federal courts that constitutes the protected federal interest. Petitioner had no such federal interest implicated; therefore, it was proper to dismiss his Section 1985(2) claim.

3. Petitioner's at-will employment was not protected by Section 1985(2).

Petitioner acknowledges that he was an employee at-will. Under Georgia law, if an employee's employment is terminable at-will, the employer with or without cause, and regardless of its motives, may discharge the employee without liability. O.C.G.A. Section 34-7-1; Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978).

Under Georgia law, an employee at-will has no right or expectation to continued employment. Therefore, the Eleventh Circuit correctly ruled in Morast that Petitioner had no constitutionally protected interest in continued employment, and, therefore, did not suffer an actual injury required to state a claim under 42 U.S.C. Section 1985(2).

Morast v. Lance, 807 F.2d 926, 930 (11th Cir. 1987).

Such a ruling is consistent with this Court's holding in Kush which protected the ability of a federal litigant to effectively present his case. Section 1985 does not afford protection to a non-party's state property interest in his employment.

4. **Petitioner has adequate state law remedies.**

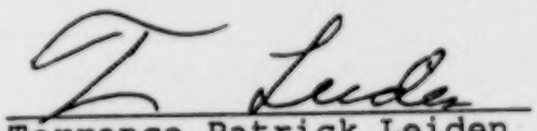
A reading that Section 1985(2) does not protect a non-party's state property interest in his employment does not leave Petitioner without remedy. Petitioner alleged a number of state law causes of action against Respondents including tortious interference with his employment and violation of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act. These state law statutes were created to protect a person's state property interests and were available to Petitioner.

CONCLUSION

The decisions cited by Petitioner make it clear that Section 1985(2) exists for the benefit of parties, not witnesses. The protected interest is a party's ability to present an effective case in federal court. Petitioner alleges no such injury. The Eleventh Circuit Court of Appeals' decision in Morast is consistent with the decisions of other Circuits and did not leave Petitioner without a remedy. Petitioner was free to pursue his state law claims in State Court.

WHEREFORE, Respondent Molloy respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,



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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEANETTE G. GARRISON, HLM, INC. (F/K/A HEALTHMASTER, INC.) AND CHRISTOPHER GARRISON

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April 9, 1998

QUESTION PRESENTED

Whether an employee at will who has not testified in, and was not a party to, a federal proceeding, but whose employment was terminated, has stated a claim upon which relief can be granted under 42 U.S.C. § 1985(2).

LIST OF PARTIES

The caption of the case contains the names of all parties. Respondent HLM, Inc. (f/k/a Healthmaster, Inc.) has no parent company, nonwholly owned subsidiaries, or affiliates to list pursuant to Rule 29.6.

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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEANETTE G. GARRISON, HLM, INC. (F/K/A HEALTHMASTER, INC.) AND CHRISTOPHER GARRISON

The Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison, individually and as Trustee for certain trusts, respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioner filed this action in the district court asserting one federal claim under 42 U.S.C. § 1985(2) and several state law claims against Jeanette Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) ("HLM"), Christopher Garrison, individually and as Trustee of certain trusts, and others. The district court dismissed Petitioner's 42 U.S.C. § 1985(2) claim based upon the binding authority of *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987). The district court also dismissed Petitioner's state law claims after declining to exercise supplemental jurisdiction over the state claims.[1] The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal on the authority of *Morast*.

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[1] Petitioner did not appeal the dismissal of the state law claims. Petitioner refiled his state law claims in a state court action captioned *Haddle v. Garrison, et al.*, Civil Action File No. 96-RCCV-572 (Superior Court of Richmond County, Georgia). The Richmond County Superior Court subsequently granted summary judgment to all defendants on all claims asserted by Petitioner.

The district court dismissed Petitioner's 42 U.S.C. § 1985(2) claim before any significant discovery took place and the district court did not consider any evidence outside of the pleadings when ruling on the Motions to Dismiss. Accordingly, the relevant facts for purpose of Respondents' Motions to Dismiss are contained in Petitioner's Complaint[2].

From September 22, 1986 until approximately April 13, 1995, Petitioner was an employee of HLM. (R10-2.) On March 8, 1995, HLM and others were indicted in the United States District Court for the Southern District of Georgia. (R10-3.) In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), the wholly owned operating subsidiary of HLM, filed for protection under Chapter 11 of the bankruptcy code. In connection with the bankruptcy proceeding, most of the employees of HLM, including Petitioner, were transferred to HHHC. (R10-3.) The bankruptcy court appointed a trustee to oversee the affairs of HHHC. (R10-3.)

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Petitioner alleges he cooperated with federal agents. While Petitioner at one point alleges he "testified pursuant to subpoena before said grand jury," Petitioner later admits "his testimony was not actually taken due to the press of time." (R10-4.) Petitioner does

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[2] Petitioner amended his Complaint to assert an additional state law claim which is not at issue in this appeal.

not allege he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges he was to be a potential witness in the criminal case against others. (R10-4-5.)

On June 21, 1995, the President of HHHC, Respondent G. Peter Molloy, terminated Plaintiff's employment with HHHC. (R10-4, 16-3.) Petitioner alleged that Mr. Molloy, the President of HHHC, terminated Petitioner's employment as a part of a conspiracy with Respondents Jeanette Garrison, Dennis Kelly and HLM[3] "in order to effectuate retaliation against [Petitioner]." (Petition for Writ of Certiorari (hereinafter "Petitioner's Brief") at 6.) Petitioner does not allege that he was threatened with force or violence by any of Respondents or that the government ever investigated or charged any of Respondents with obstruction of justice.

Although the holdings of the district court and the court of appeals properly were based on allegations in Petitioner's Complaint, Petitioner improperly includes numerous factual allegations in his petition that are not part of the record and were not considered by the district court or the court of appeals in their rulings on the Motions to Dismiss. In particular, Petitioner references testimony by Robert Pittard and testimony and rulings in

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[3] Christopher Garrison, individually and as trustee for certain trusts, is not named as a defendant in Petitioner's 42 U.S.C. § 1985(2) claim. Christopher Garrison was only named as a defendant in a single state law claim.

the case of *O'Neal v. Master Health Plan, Inc.*, No. 96-028 (S.D. Ga.) (Petitioner's Brief at 3-6). None of the references to Mr. Pittard and *O'Neal* is part of the record. This Court has repeatedly held that parties may only rely on, and the Court may only consider, information that is part of the record. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 486 n.3 (1986) (This Court must affirm or reverse upon the case as it appears on the record . . .."); *In re New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) (". . . could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case.").

Moreover, the testimony and rulings from *O'Neal* are not relevant in this case. The only party against which the plaintiff in *O'Neal* obtained a verdict was Master Health Plan, Inc. ("MHP"), which is not a party to this case. Petitioner did not allege that MHP was in any way involved in the termination of Petitioner's employment. Furthermore, in Petitioner's attempt to prejudice the Court with extraneous allegations, Petitioner conveniently omits that Mr. Pittard previously testified under oath contrary to the allegations in Petitioner's brief and that Mr. Pittard only changed his sworn testimony after he was caught embezzling funds by several of the Respondents.

REASONS FOR DENYING THE PETITION

A. There Is No Irreconcilable Conflict of Decisions Among the United States Courts of Appeals

On the question presented in this matter there is no conflict among the decisions of the United States Courts of Appeals. Petitioner seeks to portray such a conflict by ignoring all of the elements required to articulate a claim upon which relief can be granted under 42 U.S.C. § 1985(2) and focusing on a perceived disagreement between the courts as to one of those elements. Stepping back from the narrow question posited by Petitioner, and looking at the decisions of the courts of appeals in their entirety, Petitioner failed to state a claim upon which relief can be granted under any of those decisions.

The statute at issue is 42 U.S.C. § 1985(2), which provides:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . ..
>
> [I]n any case of conspiracy set forth in this section, if one or more persons engaged

> therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(2) and (3).

In *Morast v. Lance,* 807 F.2d 926, 930 (11th Cir. 1987), the Eleventh Circuit upheld the dismissal of the plaintiff's 42 U.S.C. § 1985(2) claim on three grounds. First, relying on the authority of the former Fifth Circuit in *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. June 1981) (*en banc*), *cert. denied*, 454 U.S. 1110 (1981), *overruled in part on other grounds by Kush v. Rutledge*, 460 U.S. 719, 723 (1983), the *Morast* court found that testimony before a federal agency was insufficient to satisfy the requirement that the conspiracy be related to testimony before a federal court. The former Fifth Circuit in *Kimble* explained the rationale for requiring that a witness seeking redress under 42 U.S.C. § 1985(2) actually testify before a federal court:

> Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that

threatened the attempt to create a political environment hospitable to equality." In light of the acts of violence that threatened the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in federal court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in federal court. Given the background of violence and direct intimidation prevalent at the time of the original passage of Section 1985(2), it would be anomalous to find, without any specific support in the legislative history, that Congress intended to create a federal tort remedy for an employer's economic use of public information relating to the filing of federal lawsuits. Section 1985(2) was not designed as a vehicle to remedy such allegedly tortious acts of employers against employees pursuing workmen's compensation or personal injury claims. Rather, it was intended to protect against direct violations of a party or witness's right to attend or testify in federal court.

Id. at 348 (citation omitted). The *Kimble* decision clearly reflects that Congress, in enacting 42 U.S.C. § 1985(2), was addressing particular federal interests, in this case the protection of persons attending and testifying in federal

court as witnesses or parties. Congress was not creating a general tort law applicable to the employer-employee relationship.

Second, the *Morast* court found the plaintiff's allegations of "force, intimidation, or threat" to be inadequate. Indeed, the Eleventh Circuit noted that the allegations did not provide "specific examples of acts to deter testimony or attendance by 'force, intimidation, or threat.'" *Id.* at 930 n.4. Again, looking to the legislative history is instructive:

> Section 1985(2) is derived from section 2 of the Ku Klux Klan Act of 1871. The Klan Act was induced by massive and frequently violent resistance in the Southern states to federal reconstruction and the inability or unwillingness of state governments to deal effectively with that violence. Racial equality and protection of civil rights were not the only reasons for enactment of the Klan Act, however. A major concern was restoration of civil authority and preservation of orderly government, including federal court ability to proceed without improper interference.

Kimble, 648 F.2d at 350 (Johnson, J. dissenting in part) (citations omitted). *See also McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). Again, Congress was not intending to encompass

employment disputes within the proscription of deterrence or retaliation unless it in fact involved force, intimidation or threats of the type prevalent in the reconstruction era.

Third, the *Morast* court held that the plaintiff had not alleged an injury cognizable under 42 U.S.C. § 1985(2). This is correct because the provision of 42 U.S.C. § 1985(2) at interest here was created to protect federal institutions and processes. A claim under the relevant provision must be institutionally linked to federal interests. *Kush v. Rutledge*, 460 U.S. 719, 724-25 (1983). The purpose of the Ku Klux Klan Act was not to "create an open-ended federal tort law applicable 'to all tortious, conspiratorial interferences with the rights of others.'" *Id.* at 725.

Irizarry v. Quiros, 722 F.2d 869 (1st Cir. 1983), is not irreconcilably in conflict with *Morast*. In *Irizarry*, applicants for reemployment with potential employers which were required to be registered under the federal Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.*, brought an action under 42 U.S.C. § 1985(2). The plaintiffs each previously had initiated a federal action against the potential employers. Although the actions taken by the potential employers against these applicants are not fully recited in the First Circuit's opinion, it is reflected that the potential employers engaged in conduct sufficiently egregious that the First Circuit found the potential employers' conduct "was obviously designed to intimidate and deter." *Id.* at 871. The First Circuit also upheld an award of punitive damages and attorneys' fees,

and imposed double costs on appeal and attorneys' fees because of the potential employers' conduct. *Id.* at 872-73. Thus, in *Irizarry*, federally governed employers took action against applicants for reemployment as a direct result of those applicants' pursuit of actions in the federal courts. The federal interests involved were pervasive and were "institutionally linked" to the applicants' claim.

Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993), also is not irreconcilably inconsistent with *Morast*. While it is correct *Portman* held that retaliatory termination can be an injury for the purposes of 42 U.S.C. § 1985(2), that does not end the inquiry. The plaintiff in *Portman* was a public employee who was fired after he filed a federal court action against his employer. In his underlying federal court complaint the plaintiff asserted federal statutory and constitutional claims against his government employer. Even with these allegations, the Ninth Circuit specifically did not address whether the plaintiff had pleaded sufficiently all of the elements of a claim for relief under 42 U.S.C. § 1985(2). Left open were the issues of the existence of a conspiracy and whether the mere act of filing a federal court complaint triggered the protections of 42 U.S.C. § 1985(2). *Id.* at 910. Thus, the Ninth Circuit remanded the case for further proceedings.

Common to *Irizarry* and *Portman*, but not to *Morast*, was the implication of substantial federal interests. The plaintiff in *Morast*, like Petitioner, was a private employee who had not initiated an action in federal

court. Indeed, the plaintiff in *Morast*, like Petitioner, had not even testified as a witness in a federal court action. All that existed in *Morast*, as in this case, was a plaintiff's attempt to use 42 U.S.C. § 1985(2) to create a wrongful discharge claim for relief when no such claim existed under state law. Federal interests were not institutionally linked to the claim as they were in *Irizarry* and *Portman*.

While these courts of appeals may differ with respect to articulation of individual elements of the 42 U.S.C. § 1985(2) claim for relief, the overall result is the same. The courts of appeals require that significant federal interests, of a nature intended to be protected by Congress by the enactment of the Ku Klux Klan Act of 1871, must be implicated. An employer may not terrorize its employees through force, intimidation or threat for their assertion of federal interests in the federal courts. If those institutionally linked federal interests do not pervade, however, no claim for relief under 42 U.S.C. § 1985(2) has been stated.

B. *Morast v. Lance* Was Properly Decided

Petitioner alleged that his employer, HHHC, was a Georgia corporation with its principal place of business in Georgia, that Petitioner is a Georgia resident, and that all relevant acts took place in the State of Georgia. (R10-1-3.) Under Georgia law, Petitioner was an employee at will. *Georgia Power Co. v. Busbin*, 250 S.E.2d 442 (Ga. 1978); O.C.G.A. § 34-7-1.

If "'an employee's employment is terminable at will, the employer with or without cause and regardless of its motives, may discharge the employee without liability.'" *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029, 1031 (5th Cir. Unit B Sept. 1981) (quoting *Runyan v. Economics Laboratory, Inc.*, 248 S.E.2d 44, 46 (Ga. App. 1978)). Accordingly, "allegations and evidence as to improper motives for . . . discharge are legally irrelevant and present[] no issues . . . ." *Taylor*, 656 F.2d at 1031 (quoting *Georgia Power Co. v. Busbin*, 250 S.E.2d 442, 444 (Ga. 1978)).

The Eleventh Circuit in *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987), recognized and held that the mere loss of employment at will is not sufficient to establish the actual injury element of a proper 42 U.S.C. § 1985(2) claim:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because Morast was an at will employee he had no constitutionally protected interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute.

(citations omitted.)

As previously addressed, this holding is one articulation by the Eleventh Circuit of the requirement that there be a federal interest implicated in the underlying

conduct. Employment at will does not implicate such a federal interest.

The significance of the requirement that the injury have a nexus to federal interests was explained by this Court in *Kush v. Rutledge*, 460 U.S. 719 (1983), in which this Court determined that class-based animus was not an element of a 42 U.S.C. § 1985(2) action. In analyzing the five categories of outlawed conspiratorial activities in 42 U.S.C. § 1985, this Court stated:

> Three of the five broad categories, the first two and the fifth, relate to institutions and processes of the federal government — federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3).
>
> * * *
>
> The remaining two categories, however, encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern.

Id., at 724-25. This Court held that where class-based animus is required for the "remaining two categories" (*i.e.*, those involving state concerns), it is not required with respect to the three categories involving federal interests. *Id.*

The claim for relief at issue here is the first part of 42 U.S.C. § 1985(2) — federal judicial proceedings. Consistent with this Court's recognition in *Kush* that a claim for relief under this provision must implicate activity "institutionally linked to federal interests," the Eleventh Circuit in *Morast* rejected the notion that impact on an allegedly state protected interest in employment is a legally cognizable injury to person or property under 42 U.S.C. § 1985(2). To hold otherwise would negate what this Court in *Kush* and *Griffin v. Breckenridge*, 403 U.S. 88 (1971), sought to assure — not to "create an open-ended federal tort law applicable 'to all tortious, conspiratorial interferences with the rights of others.'" *Kush*, 460 U.S. at 725. This Court achieved this result by requiring implication of a constitutionally protected equal protection interest (*i.e.*, class-based animus) when only state interests are affected. In the three other categories, including the category at issue here, a federally protected interest must be involved.

Moreover, this Court has held that at will employment is not a property interest protected under federal law. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court considered whether the termination of the employment of an assistant professor at a state university without a reason or a hearing was a violation of the professor's due process. In rejecting the professor's claim that he had a property interest in his employment protected by the federal Constitution, this Court held:

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

* * *

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of

> entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

Id. at 577-78 (footnote omitted) (emphasis in original).

This Court also addressed whether at will employment constitutes a federally protected property interest in *Bishop v. Wood,* 426 U.S. 341 (1976). In *Bishop*, a former police officer brought an action alleging that the termination of his employment without a hearing was a violation of due process. *Id.* at 344-45. Similar to *Roth*, this Court in *Bishop* rejected the police officer's claim that he had a property interest in continued employment protected by the federal Constitution and held:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however,

> the sufficiency of the claim of entitlement must be decided by reference to state law.

Id. at 344. In addition, this Court stated:

> In this case, the holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had *no* property interest.

Id. at 345 n.8 (emphasis in original).

The plaintiff in *Morast* was an employee at will under Georgia law and therefore had no property interest in continued employment protected by the federal law. As noted by the Eleventh Circuit,

> "[a]lthough we believe it is wrong to discharge a bank officer in retaliation for his reporting a banking violation, it is up to Congress, not the courts, to provide for an effective remedy."

Morast, 807 F.2d at 929.

The plain language of § 1985(2) requires that a plaintiff establish injury "in his person or property." Given the context of what fomented passage of the Ku Klux Klan Act, it is understandable that bodily injury and property damage were the types of injuries being addressed. Violence — or as is used earlier in § 1985(2),

force, intimidation or threats — was the concern. Adverse employment actions were not the type of retaliation at issue in the Ku Klux Klan Act.

Congress knows full well how to prohibit adverse actions taken in the terms and conditions of employment when it so desires. There are numerous examples of statutes in which Congress has created remedies against a person (not just an employer) who interferes with another person's employment in retaliation for assisting the government in enforcement proceedings. Such remedies are contained, for example, in the Solid Waste Disposal Act, 42 U.S.C. § 6971, CERCLA, 42 U.S.C. § 9610, and the Surface Mining Control Act, 30 U.S.C. § 1923. Congress did not include any language in 42 U.S.C. § 1985(2) protecting against adverse employment actions. Instead, 42 U.S.C. § 1985(2) provides redress for injury "to person or property."

Morast thus was correctly decided by the Eleventh Circuit. This is not to say Petitioner is without a remedy if he can show his employment improperly was terminated; that remedy just is not under 42 U.S.C. § 1985(2).

C. Petitioner Does Not Prevail Based Upon the Circuit Court Opinions Upon Which He Relies

Petitioner relies heavily on the decision of the Ninth Circuit in *Portman v. County of Santa Clara*, 995

F.2d 898 (9th Cir. 1993).[4] (Petitioner's Brief at 10-12.) However, Petitioner's claim also would have been dismissed under the Ninth Circuit's interpretation of 42 U.S.C. § 1985(2). This is because the Ninth Circuit requires that there be injury to a party in a federal court proceeding. It is this requirement that brings *Portman* within the policy articulated in *Kush v. Rutledge* requiring a federally implicated right, but just from a different approach than articulated by the Eleventh Circuit in *Morast*.

In *Portman,* the plaintiff previously had brought an action in federal court. In his 42 U.S.C. § 1985(2) claim, the plaintiff asserted that his employment was adversely affected in retaliation for his bringing of the federal action. *Id.* at 909. The Ninth Circuit specifically pointed out that the elements for a 42 U.S.C. § 1985(2) action for witness intimidation are somewhat different than for other 42 U.S.C. § 1985(2) claims, citing to *Chahal v. Paine Webber, Inc.*, 725 F.2d 20 (2d Cir. 1984). In *Chahal*, the court reversed a grant of summary judgment in a 42 U.S.C. § 1985(2) action. The court did so because the plaintiff in the 42 U.S.C. § 1985(2) action had presented sufficient facts that intimidation of a witness in the plaintiff's underlying federal action had caused the plaintiff injury in connection with the underlying federal action. *Id.* at 20.

---

[4] In an apparent typographical error, Petitioner mistakenly refers to the Appellant in *Portman* as "*Portland.*"

The Ninth Circuit made the requirement of injury to a party in an underlying action absolutely clear in *David v. United States,* 820 F.2d 1038 (9th Cir. 1987). In *David*, the 42 U.S.C. § 1985(2) plaintiff claimed she had been discharged from her employment because of her acting as a witness in a separate federal court proceeding (to which the 42 U.S.C. § 1985(2) plaintiff was not a party). The Ninth Circuit held:

> David [the 1985(2) plaintiff] has not alleged how she has been injured by her testimony in *Parodi* [the separate federal court proceeding] or her failure to appear in court. Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the *litigant* was hampered in being able to present an effective case. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under § 1985(2).

Id. at 1040 (emphasis in original) (citation omitted).

In *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983), it also was specifically noted that the "[p]laintiffs have proved that they were denied reemployment because they previously had instituted legal actions to vindicate their federal rights." The plaintiffs previously had filed actions against the defendants under the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, or the

Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq. Irizarry,* 722 F.2d at 870; *see also Rylewicz v. Beaton Servs., Ltd.,* 888 F.2d 1175, 1180 (7th Cir. 1989) ("Congress intended to provide a damage remedy only for litigants whose right to pursue a claim in federal court has been hindered by a conspiracy. . . . Otherwise the term 'witness' would have been contained in those remedial provisions."); *cf. Rode v. Dellarciprete,* 845 F.2d 1195, 1206-07 (3d Cir. 1988).

Unlike the plaintiffs in *Irizarry* and *Portman*, Petitioner was a potential witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was unaffected, and he therefore has suffered no "actual injury."

Moreover, there is no allegation that Petitioner was in any way hindered or prevented from cooperating with the government and testifying. Thus, Petitioner was not injured in his ability to testify. *Rylewicz*, 888 F.2d at 1181 ("There has been no allegation that he was in fact hampered from testifying 'freely, fully, and truthfully,' in the words of Section 1985(2) . . .. Plaintiffs have simply not pointed to an injury or deprivation within the scope of Section 1985 . . .."). Since it is the interest in being able to litigate a party's case fully in the federal courts that constitutes the protected federal interest under *Irizarry* and *Portman*, only parties hampered in their ability to litigate fully their federal actions have standing under 42 U.S.C. § 1985(2). Because Petitioner had no such federal interest

implicated and was not injured, it was proper to dismiss his 42 U.S.C. § 1985(2) claim.

D. Petitioner Failed To Plead Force, Intimidation or Threat Sufficiently

Under 42 U.S.C. § 1985(2), two or more persons must conspire to deter testimony by use of "force, intimidation or threat." When the Ku Klux Klan Act was passed in 1871, Congress intended that the statute inhibit members of the Klan from using lynchings, whippings and other acts of violence to obtain political control in the South. *See Section 1985(2) Clause One and Its Scope,* 70 Cornell L. Rev. 756, 757-59 (1985). Paragraphs 18, 19, and 20 of Petitioner's First Amended Complaint, which purport to set out the force, intimidation or threat, focuses solely on the termination of Petitioner's employment.

The Eleventh Circuit held in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), that such allegations are insufficient as a matter of law to establish "force, intimidation or threat." In *Morast*, the plaintiff's employment was terminated allegedly for the plaintiff's cooperation with federal regulators. In *Morast*, the plaintiff alleged:

> [I]n conclusory terms, drawn from the text of the statute, . . . the defendants conspired to deter, by force or intimidation, plaintiff as a witness. The only concrete actions complained of were that the defendants

> were "angry, upset and vindictive" toward the plaintiff; that they questioned the plaintiff about the source of leaks to the press about the Comptroller's investigation, implying that plaintiff was a possible source; and, that plaintiff was excluded from board meetings and given a decreased work load.

Morast v. Lance, 631 F. Supp. 474, 479 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987). As one of its bases for granting defendants' motion to dismiss, the district court stated: "Plaintiff's complaint is essentially void of the factual allegations necessary to support a claim under section 1985(2)." *Id.*

The Eleventh Circuit, in affirming the district court's grant of the motion to dismiss on this particular ground, stated:

> . . . Morast has not alleged that the defendants conspired to stop him from attending or testifying at the hearing by "force, intimidation, or threat." Morast contends only that defendants retaliated against him with anger and vindictiveness, extensive questioning regarding leaks to the press, exclusion from board meetings, and a decreased workload.[4]

> [4] The remainder of Morast's list of "retaliations" are conclusory in nature and are not specific examples of acts to deter testimony or attendance by "force, intimidation, or threat."

Morast, 807 F.2d at 930.

In one of the few decisions other than *Morast* to address what satisfies the "force, intimidation, or threat" requirement, Judge Meskill of the Second Circuit strenuously argued that "force, intimidation or threat" should "require evidence of physical force, threats of violence or similarly malevolent acts." *Keating v. Carey*, 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting); *see also Section 1985(2) Clause One and Its Scope*, 70 Cornell L. Rev. 756, 776-77 (1985) ("Judge Meskill's opinion in *Keating* offers the most promising approach" to follow the legislative intent behind 42 U.S.C. § 1985(2) without infringing on traditional state law concerns). Accordingly, given that Petitioner has pleaded even less than that held legally insufficient in *Morast*, Petitioner has failed to plead sufficiently "force, intimidation or threat," and his Complaint properly was dismissed.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 9, 1998

No. 97-1472

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, Individually and as Trustees for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 22, 1996: A Complaint for Damages was filed by Michael A. Haddle (Haddle) against Jeanette G. Garrison (J. Garrison), Dennis Kelly (Kelly) and G. Peter Molloy, Jr. (Molloy) and Healthmaster, Inc. (Healthmaster) pursuant to 42 U.S.C. Section 1985 (2) (The Civil Rights Act 1871), O.C.G.A. §16-14-6 (The Georgia Racketeer Influenced and Corrupt Organizations Act), and Georgia Law Tortious Interference;

March 27, 1996: Haddle amended his Complaint for damages, adding as additional Defendants Christopher Garrison (C. Garrison), and John Does 1-N and adding a count for fraudulent conveyance.

April 11, 1996: Molloy filed his Answer to the Complaint.

April 15, 1996: J. Garrison filed her Answer to the Complaint and Amended Complaint and filed a Motion to Dismiss the Complaint and Amended Complaint.

April 15, 1996: Healthmaster filed its answer to the Complaint and Amended Complaint and filed a Motion to Dismiss the Complaint and Amended Complaint.

April 22, 1996: C. Garrison filed his Answer to the Complaint and Amended Complaint and filed a Motion to Dismiss the Complaint and Amended Complaint.

May 1, 1996: Haddle filed his Brief and Memorandum in Opposition to the Motion of J. Garrison to Dismiss the Complaint and Amended Complaint.

May 1, 1996: Haddle filed his Opposition to the Motion of Healthmaster to Dismiss the Complaint and Amended Complaint.

May 7, 1996: Haddle filed his Brief and Memorandum in Opposition to the Motion of C. Garrison to Dismiss the Amended Complaint.

May 20, 1996: J. Garrison filed a Reply Brief in Support of her Motion to Dismiss the Complaint and Amended Complaint.

May 20, 1996: Healthmaster filed its Reply Brief in Support of its Motion to Dismiss the Complaint and Amended Complaint.

May 24, 1996: C. Garrison filed his Reply Brief in Support of his Motion to Dismiss the Complaint and Amended Complaint.

May 29, 1996: Molloy filed a Motion to Dismiss the Complaint and Amended Complaint.

May 30, 1996: Haddle filed a Response to the Motion of Molloy to Dismiss the Complaint and Amended Complaint.

June 6, 1996: Haddle filed a Supplemental Memorandum in Opposition to the Motions of J. Garrison and Healthmaster to Dismiss the Complaint and Amended Complaint.

June 25, 1996: United States District Court Judge Anthony A. Alaimo entered an Order granting J. Garrison's Motion to Dismiss the Complaint and Amended Complaint, Healthmaster's Motion to Dismiss the Complaint and Amended Complaint, C. Garrison's Motion to

Dismiss the Complaint and Amended Complaint, and Molloy's Motion to Dismiss the Complaint and Amended Complaint. The Order determined that the decision of *Morast v Lance*, 807 F. 2d, 926 (11th Cir. 1987) required that the Court dismiss the federal claim under Section 1985(2). He further dismissed without prejudice all state law claims.

July 1, 1996: Kelly filed a Motion to Dismiss Plaintiff's Complaint and Amended Complaint.

July 2, 1996: Haddle filed a Response to Kelly's Motion to Dismiss the Plaintiff's Complaint and Amended Complaint.

July 17, 1996: Haddle filed a Notice of Appeal to the United States Court of Appeals, for the 11th Circuit, from the Order of June 25, 1996.

August 8, 1996: J. Garrison, Healthmaster, and C. Garrison filed a Motion in the Court of Appeals to Dismiss the Appeal of Haddle on the grounds that the Order appealed from was not a final judgment as to all parties and claims.

August 13, 1996: An Order was signed by Judge Anthony A. Alaimo, granting Kelly's Motion to Dismiss the claim in the Complaint and Amended Complaint, which was brought under Section 1985(2), dismissing without prejudice claims against Defendants John Does' 1-N and directing the Clerk to enter the appropriate judgment closing the action.

August 15, 1996: Judgment was entered in accordance with the Orders of June 25, 1996 and August 13, 1996 and the case was closed.

August 16, 1996: Haddle filed a Brief in Response to the Motion of J. Garrison, Healthmaster, and C. Garrison to Dismiss the Appeal to the United States Court of Appeals from the Eleventh Circuit.

August 27, 1996: Haddle filed a Supplemental Response to his Brief in Response to the Motion of J. Garrison, Healthmaster, and C. Garrison to Dismiss the Appeal.

September 9, 1996: Haddle filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit from the Order of June 25, 1996, the Order of August 13, 1996, and the Judgment of August 15, 1996.

September 9, 1996: Haddle filed in the Court of Appeals, a Motion to Consolidate the Appeal filed on July 17, 1996 with that being filed on September 9, 1996 as the Appeals involved the same case.

October 17, 1996: The Court of Appeals entered an Order, denying the Motion of J. Garrison, Healthmaster, and C. Garrison to Dismiss the Appeal.

October 28, 1996: The United States Court of Appeals for the 11th Circuit granted the Motion to Consolidate the Appeal filed on July 17, 1996 (96-8856) and the Appeal filed on September 9, 1996 (96-9072).

December 9, 1996: Haddle filed his Brief in Support of his Appeal from the Orders of the United States District Court for the Southern District of Georgia, dated June 25, 1996 and August 13, 1996 and the Judgment entered by the Clerk of the United States District Court for the Southern District of Georgia, dated August 15, 1996.

December 9, 1996: Haddle filed his Suggestion of Hearing En Banc with the Court of Appeals.

January 14, 1997: Molloy filed his Brief in Response to the Appeal of Haddle.

January 16, 1997: J. Garrison, Healthmaster, and C. Garrison filed their Brief in Response to the Appeal of Haddle.

January 30, 1997: Haddle filed his Reply Brief in support of his Appeal.

January 30, 1997: Kelly filed his Brief in Opposition to the Appeal of Haddle.

January 30, 1997: The Record of Appeal was certified and transmitted to the Court of Appeals.

September 17, 1997: Letter from counsel for J. Garrison, Healthmaster and C. Garrison to Court of Appeals notifying the Court of an intervening decision and new development and enclosing the Order of the Richmond County Superior Court granting summary judgment to all defendants in the case of *Haddle v Garrison, et al.*, No. 96-RCCV-572, Superior Court of Richmond County, Georgia, June 10, 1997.

December 5, 1997: The Court of Appeals issued its Per Curiam Opinion denying Haddle's Suggestion of Hearing En Banc and affirming the judgment of the District Court, concluding that the claims of Haddle were foreclosed by the Court's decision in *Morast v Lance*, 807 F. 2d 926 (11th Circuit, 1987).

February 9, 1998: The judgment of the Court of Appeals was made the judgment of the District Court.

March 5, 1998: Haddle transmitted for filing a petition for a Writ of Certiorari with the Supreme Court of the United States.

April 3, 1998: Molloy filed a Response to the Petition for Writ of Certiorari.

April 9, 1998: J. Garrison, Healthmaster, and C. Garrison filed a Brief in Opposition to the Petition for Writ of Certiorari.

May 26, 1998: The Supreme Court of the United States granted the Petition of Haddle for a Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE Plaintiff, vs. JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., and HEALTHMASTER, INC., Defendants.	)	CASE NO. CV 196029

COMPLAINT FOR DAMAGES PURSUANT TO 42 U.S.C. §1985(2) (THE CIVIL RIGHTS ACT OF 1871), O.C.G.A. §16-14-6 (THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT), AND GEORGIA LAW OF TORTIOUS INTERFERENCE

NOW COMES Plaintiff MICHAEL A. HADDLE and for this his complaint against Defendants JEANETTE G. GARRISON ("Garrison["]), DENNIS KELLY ("Kelly"), PETER MOLLOY ("Molloy") and HEALTHMASTER, INC. ("Healthmaster") shows as follows:

INTRODUCTORY STATEMENT

1. Plaintiff is a citizen and resident of the State of Georgia.

2. Defendant Garrison is a resident of the State of South Carolina.

3. Defendants Molloy and Kelly are residents of the Southern District of Georgia.

4. Defendant Healthmaster is a corporation organized and existing under the laws of the State of Georgia with its principal place of business within the Southern District of Georgia.

5. Jurisdiction is proper in this Court over Count I of this Complaint (the Civil Rights Act of 1871) by virtue of 28 U.S.C. §1331. Jurisdiction over Count II (Georgia RICO) and Count III (Tortious Interference) is proper in this Court because these Counts are pendent to Count I.

6. Venue is proper in this Court in that all Defendants except Defendant Garrison reside within the Southern District of Georgia and in that the actions of all Defendants as alleged below occurred within the Southern District of Georgia.

GENERAL FACTUAL ALLEGATIONS

7. From September 22, 1986 until approximately April 13, 1995, Plaintiff was employed by Defendant Healthmaster.

8. From approximately April 13, 1995 until his discharge as alleged below, Plaintiff was employed by Healthmaster Home Health Care, Inc., a Georgia corporation whose stock is owned entirely by Defendant Healthmaster.

9. Defendant Garrison has at all relevant times owned 50% of the stock of Healthmaster and controlled Healthmaster until April or May, 1995, when a trustee

was appointed for Healthmaster, then a debtor in possession under Chapter 11 of the federal Bankruptcy Code, by the United States Bankruptcy Court for the Southern District of Georgia.

10. The individual Defendants herein have all served in various capacities as corporate officers and directors of Defendant Healthmaster and of Healthmaster Home Health Care, Inc.

11. Defendant Molloy has at all relevant times been employed by Defendant Healthmaster or Healthmaster Home Health Care, Inc.

12. On March 8, 1995, a grand jury convened in the United States District Court for the Southern District of Georgia, Augusta Division, filed an indictment against Defendants Garrison Kelly, Healthmaster and others charging a total of 133 counts of fraud against various defendants, which indicment [sic] is enumerated as number CR-195-11 in this Court.

13. Although not indicted, Defendant Molloy was, on information and belief, a target of the ongoing criminal investigation.

14. Plaintiff cooperated with the investigation by federal agents which preceded this indictment and testified pursuant to subpoena before said grand jury and appeared pursuant to subpoena to testify before said grand jury, although his testimony was not actually taken due to the press of time.

15. As a result of their indictment, Defendants Garrison and Kelly were banned from any participation in

the affairs of Healthmaster Home Health Care, Inc., by order of said Bankruptcy Court.

16. On June 21, 1995, after Defendants had become aware that Plaintiff would appear as a witness at the criminal trial of Indictment No. CR 195-11, Defendant Molloy, who was then President of Defendant Healthmaster, having been retained in said position by the trustee, but acting at the direction of Defendants Garrison and Kelly and pursuant to a prior understanding and agreement between these three persons, terminated Plaintiff from his employment at Healthmaster Home Health Care, Inc..

COUNT I – CONSPIRACY IN VIOLATION OF 42 U.S.C. §1985(2) (THE CIVIL RIGHTS ACT OF 1871)

17. The allegations contained in paragraphs numbered "1" through "16" are incorporated herein by reference.

18. The decision to terminate Plaintiff was made by Defendants and others, not in furtherance of the business interests of Defendant Healthmaster, but instead for the purpose of retaliating against Plaintiff for his cooperation with federal agents and his testimony under subpoena to the federal grand jury, and in order to intimidate Plaintiff and others from cooperating with federal agents or testifying in any criminal matters against them including said indictment.

19. Defendants participated in and carried out the decision to terminate Plaintiff, not in furtherance of the business interests of Defendant Healthmaster, but rather

to protect themselves as criminal defendants or potential criminal defendants.

20. By means of the above described actions, and their agreement and plan to do the same, Defendants have violated 42 U.S.C. §1985(2), in that they have conspired within the State of Georgia to deter, by force, intimidation or threat, a party or witness in the United States District Court for the Southern District of Georgia, from attending such court, or from testifying in any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of the grand jurors of such court.

21. Plaintiff has been injured in his person and property by the acts of Defendants in violation of 42 U.S.C. §1985(2), and Plaintiff is entitled to recover his damages occasioned by such injury and deprivation against Defendants jointly and severally.

22. Because Defendants' acts were willful, intentional and malicious, Plaintiff is entitled to recover punitive damages against Defendants jointly and severally.

23. Pursuant to 42 U.S.C. §1988, Plaintiff is entitled to recover his expenses of litigation including a reasonable attorney's fee from Defendants jointly and severally.

COUNT II – VIOLATION OF THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

24. The allegations contained in paragraphs numbered "1" through "23" are incorporated herein by reference.

25. The actions of Defendants alleged above in paragraphs numbered 14, 16 and 17 constitute racketeering activity within the meaning of O.C.G.A. §16-14-3(9)(A) and (B), in that they constitute a violation of 18 U.S.C. §1503 and also a felony punishable by imprisonment for more than one year under federal and Georgia common law of obstruction of justice.

26. After July 1, 1980, and within four years of Plaintiff's termination as alleged above, Defendants engaged in at least one other incident of racketeering activity that had the same or similar intent, result, accomplices or methods of commission and otherwise was interrelated to the Plaintiff's termination, by distinguishing characteristics, none of said incidents being isolated, such other incident being the termination of John P. O'Neal from his employment at Master Health Plan, Inc., a Georgia corporation ("Master Health"), in retaliation for his testimony before the same federal grand jury for which Plaintiff testified as alleged above.

27. The above incidents of racketeering activity constitute a pattern of racketeering activity, the purpose and effect of which was to acquire or maintain, directly or indirectly, an interest in or control of certain enterprises, to wit, Defendant Healthmaster and Master Health, to

conduct or participate in said enterprises, and to acquire money.

28. Defendants conspired and endeavored to conduct or participate in, directly or indirectly, the said enterprises through a pattern of racketeering activity, and to acquire money.

29. Defendants conspired and endeavored to acquire or maintain, directly or indirectly, an interest in said enterprises and to conduct or participate in, directly or indirectly, said enterprises through a pattern of racketeering activity, and to acquire money.

30. In committing the acts to which reference is made in this Count, Defendants have acted willfully, maliciously, wantonly, oppressively, intentionally, knowingly, fraudulently, in bad faith, and with reckless disregard of the consequences, and with such entire want of care as raises the presumption of conscious indifference to consequences, such as to entitle Plaintiff to punitive damages under Georgia law, including O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to limitation provided by O.C.G.A. §51-12-5.1(g), because each Defendant acted with the specific intent to cause harm to Plaintiff.

31. Plaintiff is a person injured by reason of Defendants' violation of O.C.G.A. §16-14-4 and is entitled to three times his actual damages sustained, as well as punitive damages and attorneys' fees.

COUNT III – TORTIOUS INTERFERENCE

32. The allegations contained in paragraphs numbered "1" through "31" are incorporated herein by reference.

33. Although they had no authority to act for Healthmaster Home Health Care, Inc., at the time of Plaintiff's termination, Defendants Garrison and Kelly, through their agreement with and direction to Defendant Molloy, and acting both for themselves and for Defendant Healthmaster, tortiously interfered with Plaintiff's employment relationship with Healthmaster Home Health Care, Inc. by causing Plaintiff's termination.

34. Defendant Molloy, in terminating Plaintiff from his employment at Healthmaster Home Health Care, Inc., tortiously interfered with Plaintiff's relationship with Healthmaster Home Health Care, Inc. because Defendant Molloy acted not for the benefit of Healthmaster Home Health Care, Inc. but in order to protect himself and Defendants Garrison, Kelly and Healthmaster as alleged above.

35. Plaintiff had a legitimate continuing expectation of employment with Healthmaster Home Health Care, Inc. and his termination has resulted in actual damages.

36. Because Defendants acted as alleged in paragraph 28, Plaintiff is entitled to punitive damages.

37. In acting as alleged above, Defendants have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense, whereby Plaintiff is entitled to recover his expenses of litigation including reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands trial by jury on all counts and judgment for money damages against Defendants jointly and severally in such amount for actual damages as the evidence may show, treble damages pursuant to Georgia statute as alleged above, punitive damages, and reasonable attorneys' fees and expenses of litigation, together with all costs of court and such other and further relief as the Court may deem equitable and just.

This 22nd day of February, 1996.

/s/ C. Thompson Harley
C. Thompson Harley
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(706) 724-0558

/s/ Charles C. Stebbins, III
Charles C. Stebbins, III
Georgia Bar No. 677350
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complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE Plaintiff, vs. JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 THROUGH N, individually and as Trustees of certain trusts, Defendants.	)	CASE NO. CV 196-29

AMENDED COMPLAINT FOR DAMAGES PURSUANT TO 42 U.S.C. §1985(2) (THE CIVIL RIGHTS ACT OF 1871), O.C.G.A. §16-14-6 (THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT), AND GEORGIA LAW OF TORTIOUS INTERFERENCE AND FRAUDULENT CONVEYANCE

(Filed Mar. 27, 1996)

NOW COMES Plaintiff MICHAEL A. HADDLE and for this his complaint against Defendants JEANETTE G. GARRISON ("Garrison"), DENNIS KELLY ("Kelly"), PETER MOLLOY ("Molloy"), HEALTHMASTER, INC. ("Healthmaster"), CHRISTOPHER GARRISON, as Trustee of certain trusts ("Garrison Trustee"), and JOHN

DOES 1 THROUGH N, as Trustees of certain trusts ("John Doe Trustees"), shows as follows:

—

INTRODUCTORY STATEMENT

1. Plaintiff is a citizen and resident of the State of Georgia.

2. Defendant Garrison is a resident of the State of South Carolina.

3. Defendants Molloy, Kelly and Garrison Trustee are residents of the Southern District of Georgia. Defendant John Doe Trustees are named because Plaintiff does not know whether the trusts described in Count IV hereinbelow have trustees other than Defendant Garrison Trustee.

4. Defendant Healthmaster is a corporation organized and existing under the laws of the State of Georgia with its principal place of business within the Southern District of Georgia.

5. Jurisdiction is proper in this Court over Count I of this Complaint (the Civil Rights Act of 1871) by virtue of 28 U.S.C. §1331. Jurisdiction over Count II (Georgia RICO), Count III (Tortious Interference) and Count IV (Fraudulent Conveyance) is proper in this Court because these Counts are pendent to Count I.

6. Venue is proper in this Court in that most Defendants reside within the Southern District of Georgia and in that the actions of all Defendants as alleged below occurred within the Southern District of Georgia.

GENERAL FACTUAL ALLEGATIONS

7. From September 22, 1986 until approximately April 13, 1995, Plaintiff was employed by Defendant Healthmaster.

8. From approximately April 13, 1995 until his discharge as alleged below, Plaintiff was employed by Healthmaster Home Health Care, Inc., a Georgia corporation whose stock is owned entirely by Defendant Healthmaster.

9. Defendant Garrison has at all relevant times owned 50% of the stock of Healthmaster and controlled Healthmaster until April or May, 1995, when a trustee was appointed for Healthmaster, then a debtor in possession under Chapter 11 of the federal Bankruptcy Code, by the United States Bankruptcy Court for the Southern District of Georgia.

10. The individual Defendants herein (except for Defendants Garrison Trustee and John Doe Trustees) have all served in various capacities as corporate officers and directors of Defendant Healthmaster and of Healthmaster Home Health Care, Inc.

11. Defendant Mc oy has at all relevant times been employed by Defendant Healthmaster or Healthmaster Home Health Care, Inc.

12. On March 8, 1995, a grand jury convened in the United States District Court for the Southern District of Georgia, Augusta Division, filed an indictment against Defendants Garrison, Kelly, Healthmaster and others charging a total of 133 counts of fraud against various

defendants, which indictment is enumerated as number CR-195-11 in this Court.

13. Although not indicted, Defendant Molloy was, on information and belief, a target of the ongoing criminal investigation.

14. Plaintiff cooperated with the investigation by federal agents which preceded this indictment and testified pursuant to subpoena before said grand jury and appeared pursuant to subpoena to testify before said grand jury, although his testimony was not actually taken due to the press of time.

15. As a result of their indictment, Defendants Garrison and Kelly were banned from any participation in the affairs of Healthmaster Home Health Care, Inc., by order of said Bankruptcy Court.

16. On June 21, 1995, after Defendants (other than Defendants Garrison Trustee and John Doe Trustees) had become aware that Plaintiff would appear as a witness at the criminal trial of Indictment No. CR 195-11, Defendant Molloy, who was then President of Defendant Healthmaster, having been retained in said position by the trustee, but acting at the direction of Defendants Garrison and Kelly and pursuant to a prior understanding and agreement between these three persons, terminated Plaintiff from his employment at Healthmaster Home Health Care, Inc.

COUNT I – CONSPIRACY IN VIOLATION OF 42 U.S.C. §1985(2) (THE CIVIL RIGHTS ACT OF 1871)

17. The allegations contained in paragraphs numbered "1" through "16" are incorporated herein by reference.

18. The decision to terminate Plaintiff was made by Defendants (other than Defendants Garrison Trustee and John Doe Trustees) and others, not in furtherance of the business interests of Defendant Healthmaster, but instead for the purpose of retaliating against Plaintiff for his cooperation with federal agents and his testimony under subpoena to the federal grand jury, and in order to intimidate Plaintiff and others from cooperating with federal agents or testifying in any criminal matters against them including said indictment.

19. Defendants (other than Defendants Garrison Trustee and John Doe Trustees) participated in and carried out the decision to terminate Plaintiff, not in furtherance of the business interests of Defendant Healthmaster, but rather to protect themselves as criminal defendants or potential criminal defendants.

20. By means of the above described actions, and their agreement and plan to do the same, Defendants (other than Defendants Garrison Trustee and John Doe Trustees) have violated 42 U.S.C. §1985(2), in that they have conspired within the State of Georgia to deter, by force, intimidation or threat, a party or witness in the United States District Court for the Southern District of Georgia, from attending such court, or from testifying in any matter pending therein, freely, fully, and truthfully,

or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of the grand jurors of such court.

21. Plaintiff has been injured in his person and property by the acts of Defendants (other than Defendants Garrison Trustee and John Doe Trustees) in violation of 42 U.S.C. §1985(2), and Plaintiff is entitled to recover his damages occasioned by such injury and deprivation against Defendants jointly and severally.

22. Because said Defendants' acts were willful, intentional and malicious, Plaintiff is entitled to recover punitive damages against Defendants jointly and severally.

23. Pursuant to 42 U.S.C. §1988, Plaintiff is entitled to recover his expenses of litigation including a reasonable attorney's fee from said Defendants jointly and severally.

COUNT II – VIOLATION OF THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

24. The allegations contained in paragraphs numbered "1" through "23" are incorporated herein by reference.

25. The actions of Defendants alleged above in paragraphs numbered 14, 16 and 17 constitute racketeering activity within the meaning of O.C.G.A. §16-14-3(9)(A) and (B), in that they constitute a violation of 18 U.S.C. §1503 and also a felony punishable by

imprisonment for more than one year under federal and Georgia common law of obstruction of justice.

26. After July 1, 1980, and within four years of Plaintiff's termination as alleged above, Defendants (other than Defendants Garrison Trustee and John Doe Trustees) engaged in at least one other incident of racketeering activity that had the same or similar intent, result, accomplices or methods of commission and otherwise was interrelated to the Plaintiff's termination, by distinguishing characteristics, none of said incidents being isolated, such other incident being the termination of John P. O'Neal from his employment at Master Health Plan, Inc., a Georgia corporation ("Master Health"), in retaliation for his testimony before the same federal grand jury for which Plaintiff testified as alleged above.

27. The above incidents of racketeering activity constitute a pattern of racketeering activity, the purpose and effect of which was to acquire or maintain, directly or indirectly, an interest in or control of certain enterprises, to wit, Defendant Healthmaster and Master Health, to conduct or participate in said enterprises, and to acquire money.

28. Defendants (other than Garrison Trustee and John Doe Trustees) conspired and endeavored to conduct or participate in, directly or indirectly, the said enterprises through a pattern of racketeering activity, and to acquire money.

29. Said Defendants conspired and endeavored to acquire or maintain, directly or indirectly, an interest in said enterprises and to conduct or participate in, directly

or indirectly, said enterprises through a pattern of racketeering activity, and to acquire money.

30. In committing the acts to which reference is made in this Count, said Defendants have acted willfully, maliciously, wantonly, oppressively, intentionally, knowingly, fraudulently, in bad faith, and with reckless disregard of the consequences, and with such entire want of care as raises the presumption of conscious indifference to consequences, such as to entitle Plaintiff to punitive damages under Georgia law, including O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to limitation provided by O.C.G.A. §51-12-5.1(g), because each Defendant acted with the specific intent to cause harm to Plaintiff.

31. Plaintiff is a person injured by reason of Defendants' violation of O.C.G.A. §16-14-4 and is entitled to three times his actual damages sustained, as well as punitive damages and attorneys' fees.

COUNT III – TORTIOUS INTERFERENCE

32. The allegations contained in paragraphs numbered "1" through "31" are incorporated herein by reference.

33. Although they had no authority to act for Healthmaster Home Health Care, Inc., at the time of Plaintiff's termination, Defendants Garrison and Kelly, through their agreement with and direction to Defendant Molloy, and acting both for themselves and for Defendant Healthmaster, tortiously interfered with Plaintiff's

employment relationship with Healthmaster Home Health Care, Inc. by causing Plaintiff's termination.

34. Defendant Molloy, in terminating Plaintiff from his employment at Healthmaster Home Health Care, Inc., tortiously interfered with Plaintiff's relationship with Healthmaster Home Health Care, Inc. because Defendant Molloy acted not for the benefit of Healthmaster Home Health Care, Inc. but in order to protect himself and Defendants Garrison, Kelly and Healthmaster as alleged above.

35. Plaintiff had a legitimate continuing expectation of employment with Healthmaster Home Health Care, Inc. and his termination has resulted in actual damages.

36. Because said Defendants acted as alleged in paragraph 30, Plaintiff is entitled to punitive damages.

37. In acting as alleged above said Defendants have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense, whereby Plaintiff is entitled to recover his expenses of litigation including reasonable attorneys' fees.

COUNT IV – FRAUDULENT CONVEYANCE

38. The allegations contained in paragraphs numbered 1 through 37 are incorporated herein by reference.

39. On information and belief, on a date or dates unknown but believed by Plaintiff to be sometime during the year 1995 Defendant Garrison either conveyed her stock interest in Defendant Healthmaster, or caused Defendant Healthmaster to convey its stock interest in

Healthmaster Home Health Care, Inc., to Defendant Garrison Trustee and/or Defendant John Doe Trustees in trust for the benefit of Defendant Garrison and Defendant Garrison's children. Also, on information and belief, on a date or dates unknown but believed by Plaintiff to be sometime during the year 1995, Defendant Garrison either conveyed or caused to be conveyed her stock interest in an affiliate of Defendant Healthmaster, Health Care Services, Inc., to Defendant Garrison Trustee and/or Defendant John Doe Trustees in trust for the benefit of Defendant Garrison and Defendant Garrison's children. Plaintiff does not know the exact date or dates of such conveyances (the "Conveyances") or the names and trustees (other than Defendant Garrison Trustee), if any, of the grantee trusts.

40. Each of the Conveyances was made at a time when the grantor was insolvent, was made in trust, and reserved a trust or benefit to the grantor.

41. Each of the Conveyances was voluntary and was made not for valuable consideration at a time when Defendant Garrison and/or Defendant Healthmaster was insolvent.

42. Each of the Conveyances was made by Defendant Garrison and Defendant Healthmaster with the intention to delay or to defraud creditors, which intention was known to the taking parties.

43. Each of the Conveyances is null and void as to Plaintiff.

44. Each of the Conveyances was made by the grantor and was received by Defendant Garrison Trustee

and/or Defendant John Doe Trustees, with fraudulent intent evidencing willful misconduct, malice, fraud, wantonness, oppression and that entire want of care which would raise the presumption of conscious indifference to consequences, so as to entitle Plaintiff to punitive damages pursuant to O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to limitation provided by O.C.G.A. §51-12-5.1(g), because each of the said Defendants acted with the specific intent to cause harm to creditors such as Plaintiff.

45. In connection with the matters to which reference is made in this Count, Defendants Garrison, Garrison Trustee and John Doe Trustees have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense so as to entitle Plaintiff to an award of attorneys' fees and expenses of litigation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands trial by jury on all counts and judgment (1) as to all Defendants jointly and severally except Defendants Garrison Trustee and John Doe Trustees, for money damages in such amount for actual damages as the evidence may show and treble damages pursuant to Georgia statute as alleged above, (2) as to Defendants Garrison, Garrison Trustee as trustee and John Doe Trustees as trustees, jointly and severally, a decree establishing that the Conveyances are null and void as to Plaintiff, and (3) as to all Defendants, jointly and severally, judgment for punitive damages and reasonable attorneys' fees and expenses of litigation,

together with all costs of court and such other and further relief as the Court may deem equitable and just.

This 27th day of March, 1996.

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/s/ Charles C. Stebbins, III
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, Plaintiff, v. JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., a Georgia corporation, CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts, Defendants.	Civil Action No. CV-196-029

MOTION OF JEANETTE G. GARRISON TO DISMISS COMPLAINT AND AMENDED COMPLAINT

Defendant Jeanette G. Garrison, pursuant to Fed. R. Civ. P. 12, hereby moves to dismiss the Complaint and Amended Complaint against her on the grounds that Count I fails to state a claim upon which relief can be granted, and since Counts II, III and IV plead only state law claims, this Court lacks subject matter jurisdiction over those claims. The grounds for this motion are more fully set forth in the Brief in Support filed contemporaneously herewith.

WHEREFORE, Jeanette G. Garrison respectfully requests that this Motion and the grounds therefor be inquired into and that this Motion be granted.

This 13th day of April, 1996.

/s/ Phillip A. Bradley
Phillip A. Bradley
Georgia Bar No. 075137

LONG, ALDRIDGE
& NORMAN, LLP
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303 Peachtree Street
Atlanta, GA 30308
(404) 527-8312

Attorney for Defendant
Jeanette G. Garrison

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, Plaintiff, v. JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts, Defendants.	Civil Action No. CV-196-029

MOTION OF HLM, INC. TO DISMISS COMPLAINT AND AMENDED COMPLAINT AND BRIEF IN SUPPORT THEREOF

HLM, Inc. ("HLM") (f/k/a Healthmaster, Inc.) respectfully moves the Court to dismiss the complaint and amended complaint. In order to avoid burdening the Court with repetitive and duplicative pleadings and motions, and since the grounds and issues are the same, HLM hereby adopts and incorporates by reference the Brief in Support of Motion to Dismiss filed by Jeanette G. Garrison.

WHEREFORE, HLM respectfully requests that this motion be granted and that the Complaint and Amended Complaint as to HLM be dismissed.

This 13 day of April, 1996.

/s/ Phillip A. Bradley
Phillip A. Bradley
Georgia Bar No. 075137

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& NORMAN, LLP
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303 Peachtree Street
Atlanta, GA 30308
(404) 527-8312

Attorney for Defendant
HLM, Inc.

[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, Plaintiff, v. JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts, Defendants.	Civil Action No. CV-196-029

MOTION OF CHRISTOPHER GARRISON, INDIVIDUALLY AND AS TRUSTEE OF CERTAIN TRUSTS, TO DISMISS COMPLAINT AND AMENDED COMPLAINT AND BRIEF IN SUPPORT THEREOF

Christopher Garrison, individually and as Trustee of certain trusts, ("Garrison") respectfully moves the Court to dismiss the complaint and amended complaint. In order to avoid burdening the Court with repetitive and duplicative pleadings and motions, and since the grounds and issues are the same, Garrison hereby adopts and incorporates by reference the Brief in Support of Motion to Dismiss filed by Jeanette G. Garrison.

In addition, Garrison hereby supplements the Brief in Support of Motion to Dismiss filed by Jeanette G. Garrison. Garrison is not a defendant in the federal claim asserted in Count I of the Complaint and Amended Complaint. Garrison is a defendant only in Count IV of the Amended Complaint which is a claim under Georgia law. Therefore, there is no independent federal basis for this Court asserting jurisdiction over Garrison.

Plaintiff bases its claim of jurisdiction over Garrison in this Court on 28 U.S.C. § 1367. However, supplemental jurisdiction over "additional parties" is only appropriate if the "claims . . . are so related to claims in the action with[ ] . . . original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The state claim must "involve the same facts, occurrences, witnesses, and evidence" as the federal claim to be part of the same case or controversy. *Palmer v. Hospital Authority of Randolph County*, 22 F.3d 1559, 1566-67 (11th Cir. 1994). For supplemental jurisdiction to exist, "the state and federal claims must arrive from a common nucleus of operative fact." *Lehighton Area School District v. Gilbert*, 787 F. Supp. 429, 432 (M.D. Pa. 1992) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966)).

The federal claim asserted by Plaintiff in Count I of the Complaint and Amended Complaint alleges that the Defendants, other than Garrison, conspired to retaliate against Plaintiff for his cooperation with a federal government investigation and to intimidate Plaintiff from cooperating further and testifying in a federal criminal trial. Count IV of the Amended Complaint, on the other hand, alleges that Defendant Jeanette G. Garrison, in

violation of Georgia law, fraudulently conveyed her stock in HLM, Inc. (f/k/a Healthmaster, Inc.) for the benefit of herself and her children. Further, the other state law claims asserted in Counts II and III of the Complaint and Amended Complaint both relate to the termination of Plaintiff's employment. Counts II and III may relate to the same facts as Count I but they clearly do not share the same facts as Count IV.

Counts I and IV of the Complaint and Amended Complaint are completely unrelated and, therefore, there is no basis for supplemental jurisdiction over Garrison. Counts I and IV will not share the same facts, occurrences, witnesses or evidence. Plaintiff does not allege, nor is it conceivable, that Jeanette G. Garrison's transfer of her stock in HLM, Inc. was in any way related to Plaintiff's alleged cooperation and testimony for the government in a federal criminal trial. For these reasons, Plaintiff's Complaint as to Garrison should be dismissed for a lack of subject matter jurisdiction. *See, e.g., Counsel of Unit Owners v. Recreational Industries, Inc.*, 793 F. Supp. 120 (D. Md. 1992) (the plaintiff's state law claim requesting injunctive relief for alleged violations of Condominium Declaration was not sufficiently related to the plaintiff's anti-trust claim); *Smith v. Burdette Chrysler Corp.*, 74 F. Supp. 380 (D.S.C. 1991) (the defendant against which the plaintiff had asserted only state law claims was not subject to supplemental jurisdiction because the claims were uniquely state law matters).

WHEREFORE, Garrison respectfully requests that this motion be granted and that the Complaint and Amended Complaint as to Garrison be dismissed.

This 11th day of April, 1996.

/s/ Phillip A. Bradley
Phillip A. Bradley
Georgia Bar No. 075137

LONG, ALDRIDGE
& NORMAN, LLP
One Peachtree Center
Suite 5300
303 Peachtree Street
Atlanta, GA 30308
(404) 527-8312

Attorney for Defendant
Christopher Garrison,
individually and as Trustee
for certain trusts

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, Plaintiff, v. JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts, Defendants.	Civil Action File No. CV196-029

MOTION OF G. PETER MOLLOY, JR. TO DISMISS COMPLAINT AND AMENDED COMPLAINT

Defendant G. Peter Molloy, Jr. pursuant to Fed. R. Civ. P. 12, hereby moves to dismiss the Complaint and amended Complaint against him on the grounds that Count I fails to state a claim upon which relief can be granted, and since Counts II and III plead only state law claims, this Court lacks subject matter jurisdiction over those claims. Grounds for this motion are more fully set

forth in the Brief in Support filed contemporaneously herewith.

WHEREFORE, Defendant Molloy prays that his Motion to Dismiss be granted.

This 29th day of May, 1996.

/s/ J. Patrick Claiborne
J. PATRICK CLAIBORNE
GA State Bar No. 126337
Attorney for Defendant
G. Peter Molloy, Jr.

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, Plaintiff,	:	CIVIL ACTION
v.	:	
JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., a Georgia Corporation, CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,	:	
Defendants.	:	NO. CV196-29

ORDER

(Filed Jun. 25, 1996)

Plaintiff, Michael A. Haddle, has brought the current litigation seeking damages under Section 1985(2) of Title 42 to the United States Code, and state law. Presently before the Court are four motions to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. These motions have been filed by Defendants, Jeanette G. Garrison (DKT. #21), Healthmaster, Inc. (DKT. #23), Christopher Garrison (DKT. #26), and G. Peter Molloy, Jr. (DKT. #44). For the reasons stated below, Defendants' motions will be **GRANTED.**

FACTS

Haddle is a former employee of Healthmaster Home Health Care, Inc. He claims that he was improperly discharged from his employment by Defendants in an attempt to deter his participation as a witness in a Federal criminal trial. At the times relevant to this litigation, Haddle concedes that he was an at-will employee.

DISCUSSION

I. Rule 12(b)(6)

Rule 12(b)(6) permits a defendant to move to dismiss a complaint on the grounds that the plaintiff has failed to state a claim upon which relief can be granted. A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of a 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true. *Jackson v. Okaloosa County Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994). A court should not dismiss a complaint for failure to state a claim unless it is clear that the plaintiff can prove "no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).; *See also Blackston v. State of Alabama*, 30 F.3d 117, 119 (11th Cir. 1994) (citing, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)).

II. 42 U.S.C. § 1985(2)

Section 1985(2) grants a private cause of action for injuries when:

> [T]wo or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified. . . .

In the case at bar, Haddle asserts that he can maintain an action under Section 1985(2) despite the fact that he was defined as an at-will employee during the term of his employment. This is directly contrary to binding precedent of the Eleventh Circuit. Case law states:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because [Plaintiff] was an at-will employee . . . he has no constitutionally protected interest in continued employment. Therefore, [Plaintiff's] discharge did not constitute an actual injury under this statute.

Morast v. Lance, 807 F.2d 926, 930 (11th Cir. 1987). Given the clear language of *Morast*, the Court is required to **DISMISS** Haddle's claim under Section 1985(2).

III. State Law Claims

Haddle has also alleged numerous state law claims against Defendants. Since the federal issue pending in this litigation has been disposed, the Court believes that the remaining state law issues should be left to the courts

of Georgia. The Court declines to retain discretionary supplemental jurisdiction over the remainder of this case. *See* 28 U.S.C. § 1367(c)(3).

CONCLUSION

The Court has determined that, under Rule 12(b)(6) Haddle has failed to state a federal claim upon which relief can be granted. His claim under section 1985(2) is **DISMISSED** with respect to the above named Defendants.[1] Additionally, all state law claims are **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED, this 25 day of June, 1996.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[1] Haddle's claims against Dennis Kelly and the unnamed John Does cannot be dismissed, as a motion requesting such action has not been filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE, Plaintiff, vs. JEANETTE G. GARRISON, DENIS [SIC] KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts, Defendants.	)	CASE NO. CV 196-029

DEFENDANT DENNIS KELLY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND AMENDED COMPLAINT

Defendant Dennis Kelly, pursuant to Fed. R. Civ. P. 12, hereby moves to dismiss the Complaint and Amended Complaint against her on the grounds that Count I fails to state a claim upon which relief can be granted, and since Counts II, III, and IV plead only state law claims, this Court lacks subject matter jurisdiction over those claims. The grounds for this motion are more fully set forth in the Brief in Support filed contemporaneously herewith.

WHEREFORE, Dennis Kelly respectfully requests that this Motion and the grounds therefor be inquired into and that this Motion be granted.

This 1st day of July, 1996.

/s/ William H. Lumpkin
William H. Lumpkin

William H. Lumpkin
505 Courthouse Lane
Augusta, Georgia 30901
706-724-2323
Ga. Bar #461025

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

MICHAEL A. HADDLE,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., a Georgia Corporation, CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,	:	NO. CV196-29
Defendants.	:	

ORDER

(Filed Aug. 13, 1996)

Plaintiff, Michael A. Haddle, brings the current litigation seeking damages under Section 1985(2) of Title 42 to the United States Code and state law. Presently before the Court is the motion of Defendant, Dennis Kelly, to dismiss under the provisions of Rule 12 of the Federal Rules of Civil Procedure. For the reasons stated in the June 25, 1996, Order, the Court finds that Haddle has failed to state a claim upon which relief can be granted. Accordingly, Kelly's motion is **GRANTED**.

The only remaining defendants in this case are the unknown John Does 1 through N. The Court finds that Haddle has failed to perfect service on these defendants

within the 120 day limit mandated by Rule 4(m) of the Federal Rules of Civil Procedure. Therefore, the claims against these defendants must also be **DISMISSED** without prejudice. The clerk is directed to enter the appropriate judgment closing this action.

SO ORDERED, this 13 day of August, 1996.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

MICHAEL A. HADDLE,
Plaintiff,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., a Georgia Corporation, CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,
Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 196-029

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, in accordance with the Orders of this Court entered on June 25, 1996 and August 13, 1996 which granted the Motions to Dismiss by Defendants Jeanette G. Garrison, G. Peter Molloy, Jr., Healthmaster, Inc., Christopher Garrision, and Dennis Kelly, respectively, this civil action hereby stands **DISMISSED**. Costs are hereby assessed against the Plaintiff, and are to be taxed by the Clerk of this Court.

IT IS FURTHER ORDERED that the claims against Defendants John Does 1 through N are hereby **DISMISSED** without prejudice.

AUGUST 15, 1996
Date

HENRY R. CRUMLEY, JR.
Clerk

/s/ Joseph A. Howell, III
(By) Deputy Clerk

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-8856

D. C. Docket No. CV 196-29 (AAA)

MICHAEL A. HADDLE,

Plaintiff-Appellant,

versus

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, et al.,

Dedendants-Appellees.

No. 96-9072

D. C. Docket No. 96-00029-CV-1 (AAA)

MICHAEL A. HADDLE,

Plaintiff-Appellant,

versus

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, JOHN DOES, 1 Throuth N, individually and as Trustees of certain trusts,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Georgia

(Filed December 5, 1997)

Before COX and BARKETT, Circuit Judges, and HUNT,* District Judge. PER CURIAM:

Michael A. Haddle appeals following the district court's dismissal of his 42 U.S.C. § 1985(2) claim for failure to state a claim. We conclude that Haddle's arguments on appeal are foreclosed by this court's decision in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987). The judgment of the district court is therefore affirmed.

AFFIRMED.[1]

---

*Honorable Willis B. Hunt, Jr., U. S. District Judge for the Northern District of Georgia, sitting by designation.

[1] No member of this panel nor other judge in regular active service on the court has requested that the court be polled on Haddle's Suggestion of Hearing En Banc. *See* Fed.R.App.P.35; 11th Cir.R. 35-5. Therefore, Haddle's Suggestion of Hearing En Banc is denied.

LONG ALDRIDGE
& NORMAN
ATTORNEYS AT LAW

Writer's Direct Dial Number
(404) 527-8312

September 17, 1997

VIA HAND DELIVERY

The Honorable Miguel J. Cortez
Clerk, United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

Re: Haddle v. Garrison, et al.,
Case No. 96-8856

Dear Mr. Cortez:

Appellees Jeanette Garrison; HLM, Inc. (f/k/a Healthmaster, Inc.); and J. Christopher Garrison, pursuant to Fed. R. App. P. 28(j) and Eleventh Circuit Rule 28-4 I.O.P.-6, submit this letter to bring to the Court's attention an intervening decision and new development. This development is the decision of the Superior Court of Richmond County, Georgia in *Haddle v. Garrison, et al.*, No. 96-RCCV-572 (Superior Court of Richmond County, Georgia, June 10, 1997) granting summary judgment to the defendants in that case, who are the Appellees in this case. (A copy is attached because the decision is not reported.) This decision is relevant to the argument made by Appellant that this case is distinguishable from *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) because Appellant alleges the Appellees tortiously interfered with Appellant's employment. This point is argued at pages 10

through 12 and 14 through 16 of Appellant's initial brief. These Appellees noted the pendency of this state court action on page 2, note 1, of their brief and the point is argued at pages 18 through 19 of these Appellees' brief.

If I can be of further service to the Court, do not hesitate to contact me.

Very truly yours,

/s/ Phillip A. Bradley
Phillip A. Bradley

PAB/dmw
Enclosure

cc: Charles C. Stebbins, III, Esq.
Richard E. Miley, Esq.
C. Thompson Harley, Esq.
J. Patrick Claiborne, Esq.
(all w/enc.; via fax and U.S. mail)

SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

MICHAEL A. HADDLE, Plaintiff	)	
v.	)	Civil Action File No. 96-RCCV-572
JEANETTE G. GARRISON, G. PETER MOLLOY, JR., HEALTHMASTER, INC., and CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, Defendants.	)	

ORDER

(Filed Sept. 19, 1997)

The following motions are before the Court: (1) Defendants Jeanette G. Garrison and Healthmaster, Inc.'s Motion for an Entitled Partial Summary Judgment; (2) Defendant G. Peter Molloy's Motion for Summary Judgment; and (3) Defendants Jeanette G. Garrison and Christopher Garrison's Motion for Summary Judgment. After careful review, the Court hereby: (1) GRANTS Defendants Jeanette G. Garrison and Healthmaster, Inc.'s Motion for an Entitled Partial Summary Judgment; (2) GRANTS Defendant G. Peter Molloy's Motion for Summary Judgment; and (3) GRANTS Defendants Jeanette G. Garrison and Christopher Garrison's Motion for Summary Judgment.

Since the first two motions involve similar facts and legal issues, they will be addressed together. The Garrisons' motion has different facts and issues and will be discussed separately.

I. Garrison-HLM, Inc. and Molloy Motions

STATEMENT OF FACTS AND PROCEDURAL HISTORY

These motions involve Counts I (Georgia RICO violations) and II (tortious interference) of Plaintiff's Complaint.

Plaintiff formerly served as Director of Cost Reimbursement at Defendant Healthmaster, a corporation owned by Mrs. Garrison and her husband and controlled by Mrs. Garrison. (Healthmaster eventually changed its name to HLM, Inc.) At all relevant times, Plaintiff was an at-will employee of Healthmaster.

In 1994, the federal government began to investigate Healthmaster for fraudulent reimbursements it received from Medicare. Mrs. Garrison eventually pleaded guilty to related charges in July 1995, and the charges against Healthmaster were dropped.

In April of 1995, Healthmaster Home Health Care, Inc. ("HHHC"), a wholly owned subsidiary of HLM, Inc. (f/k/a/ Healthmaster, Inc.) ("HLM", filed for bankruptcy. All HLM employees were subsequently transferred to HHHC. Also in April 1995, Mrs. Garrison appointed Molloy, then an in-house lawyer for HLM, president of HHHC. Although Mrs. Garrison maintained contacts with HLC and HHHC up until her plea, it

appears that Molloy and A. Stephenson Wallace, the bankruptcy trustee appointed to this case, controlled the daily operations of the corporations after April 1995.

On June 21, 1995, Molloy, with the approval of the bankruptcy trustee, terminated Plaintiff. Molloy fired Plaintiff because he "stop[ped] doing his job" and "he had been very disloyal to the company." (Molloy Depo. pp. 8-9.) Molloy claims that he did not consult with or otherwise receive instructions from Mrs. Garrison before terminating Plaintiff. (Id. at 203-04.) Mrs. Garrison claims that she did not learn of Plaintiff's termination until after it happened. (J. Garrison Depo. pp. 75-76.)

On March 18, 1997, Mrs. Garrison and HLM, Inc. filed their Motion for Partial Summary Judgment on Counts I and II of Plaintiff's Second Amended Complaint. Molloy filed his Motion for Summary Judgment on March 31, 1997, and it likewise pertains to only Counts I and II.

CONCLUSIONS OF LAW

A. *Tortious Interference*

O.C.G.A. § 34-7-1 states in pertinent part that "an indefinite hiring may be terminated at will by either party." An employee may bring a claim for tortious interference with an employment contract if he shows that "a party with no authority to discharge the employee, being activated by an unlawful scheme or purpose to injure and damage him, maliciously and unlawfully persuades the employer to breach the contract with the employee." *Moore v. Barge*, 210 Ga. App. 552, 553, 436 S.E.2d 746 (1993), *quoting Campbell v. Carroll*, 121 Ga. App. 497, 499,

174 S.E.2d 375 (1978). However, "a person whose employment contract is at will has no cause of action for wrongful termination or tortious interference with the contract against one who has an absolute right to terminate that employee." *Moore; see also Georgia Power Co. v. Busbin*, 242 Ga. 612, 613, 250 S.E.2d 442 (1978); *Jellico v. Effingham County*, 221 Ga. App. 252, 253, 471 S.E.2d 36 (1996); *Ikemiya v. Shibamoto America*, 213 Ga. App. 271, 273 (1), 444 S.E.2d 351 (1994); *Mr. B's Oil Co. v. Register*, 181 Ga. App. 166, 167, 351 S.E.2d 533 (1986); *Troy v. Interstate Financial*, 171 Ga. App. 763, 766 (1), 320 S.E.2d 872 (1984).

Accordingly, the issue is whether Molloy had the authority to fire Plaintiff. At all relevant times Plaintiff was an at-will employee of HHHC. Molloy was president of HHHC when he fired Plaintiff. Along with Steve Wallace, the bankruptcy trustee for Healthmaster, Molloy ran the daily operations of HHHC. Molloy conferred with and received approval from Wallace before firing Plaintiff. (Wallace Depo. pp. 10 and 67) Therefore, Molloy had the authority to fire Plaintiff because he was the chief executive officer of HHHC and because he obtained the necessary authorization from the bankruptcy trustee. "Since the record shows that [Molloy], as president of [HHHC], had absolute authority to terminate [Haddle], he cannot be held liable." *Moore*, 210 Ga. App. at 553.

Plaintiff's allegations of a conspiracy of retaliatory discharge are unavailing. "Where the plaintiff's employment is terminable at will, the employer, with or without cause and regardless of the motives involved, can discharge the employee without incurring liability. Lengthy allegations regarding the motives or reasons for the firing are legally irrelevant." *Mr. B's Oil Co.*, 181 Ga. App. at

167. (citations omitted) *See also Miles v. Bibb Company*, 177 Ga. App. 364, 365, 339 S.E.2d 316 (1985).

"If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a home of cards. All of the other disputes of fact are rendered immaterial." *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991). Plaintiff cannot prove an essential element of his tortious interference claim, that is, he cannot show that Molloy lacked the authority to fire him. If the claim fails against Molloy, it also fails against Mrs. Garrison and HLM, since their liability for this claim depends on whether Molloy was authorized to fire Plaintiff. Molloy was, and the tortious interference claims against the Defendants fails.

B. *RICO*

O.C.G.A. § 16-14-4, the Georgia RICO Act, prohibits (a) the acquisition of anything of value "through a pattern of racketeering activity or proceeds derived therefrom"; (b) any participation in an enterprise "through a pattern of racketeering activity"; and (c) any conspiracy to violate (a) or (b). O.C.G.A. § 16-14-6(c) creates a civil remedy for a plaintiff who is "injured by reason of any violation of Code Section 16-14-4. . . . "

To maintain a cause of action under Georgia RICO, a plaintiff must establish a pattern of racketeering activity. O.C.G.A. § 16-14-3(8) defines a "pattern of racketeering activity" as "engaging in *at least two* incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission

or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." (emphasis added) "Racketeering activity" means "to commit, to attempt to commit, or to solicit, coerce or intimidate another person to commit any crime which is chargeable by indictment" under a list of laws. O.C.G.A. § 16-14-3(9).

Plaintiff cites three "predicate acts" that constitute a pattern of racketeering activity: (1) his employment termination; (2) the placing of Mr. O'Neal (a former employee of Master Health Plan, a subsidiary of Healthmaster) on administrative leave; and (3) the termination of Mr. O'Neal's employment. As was stated above, Plaintiff's employment was lawfully terminated; therefore, he cannot use his termination to establish racketeering activity.

As for the predicate acts relating to Mr. O'Neal, Judge Alaimo has ruled previously that these acts were lawful. In granting Mrs. Garrison's, HLM's and Molloy's motions for summary judgment on Mr. O'Neal's Georgia RICO claim, the court held:

> [t]he difficulty with O'Neal's claim is that it is based upon two predicate acts that, under Georgia law, are lawful. Garrison had authority to place O'Neal on administrative leave and Peloquin had authority to fire O'Neal. Both actions were lawful under Georgia law because O'Neal was merely an at-will employee who could be fired for virtually any reason at any time.

O'Neal v. Garrison, No. CV-196-28 (S.D. Ga. Feb. 28, 1997) at pp. 8-9.

Although the *O'Neal* decision is not binding on this Court, it should be extremely persuasive. Judge Alaimo relied on *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), which held "that an at-will employee who is terminated cannot use the federal RICO statute to recover for that termination." *O'Neal*, at p. 7. In *Morast* the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's Georgia RICO claim, noting that "Georgia's RICO statutes are essentially identical to the federal RICO statutes." *Morast*, 807 F.2d at 933.[1]

In both *Morast* and *O'Neal*, the court refused to allow the plaintiff to use the RICO statutes to recover for the loss of his job. Realizing the similarities between Georgia and federal RICO law, this Court likewise denies Plaintiff any relief under Georgia RICO. He cannot establish a pattern of racketeering activity since the Defendants lawfully terminated him and Mr. O'Neal. Although Plaintiff notes that Judge Alaimo found that O'Neal did have a claim for illegal retaliation under federal law, this is only one illegal act and therefore is not a pattern of racketeering activity. Accordingly, Plaintiff's RICO claims fail.

---

[1] In his Brief in Opposition to Motion for Partial Summary Judgment of Defendants Jeanette G. Garrison and HLM, Inc. (formerly Healthmaster), Plaintiff states that "[i]n an all honesty, . . . if the *Morast* decision is correct on this point, then his case must fail." He then argues that *Morast* is not binding on this Court and that it was incorrectly decided.

DECISION

For the foregoing reasons, the Court GRANTS Mrs. Garrison and HLM's Motion for Partial Summary Judgment and Molloy's Motion for Summary Judgment. Defendants lawfully terminated Plaintiff, an at-will employee, and therefore are entitled to judgment as a matter of law on Plaintiff's tortious interference and RICO claims.

II. Jeanette and Christopher Garrison's Motion

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This motion involves Count III (fraudulent conveyance) of Plaintiff's Complaint.

In 1993, the accounting firm of Ernst & Young suggested the use of grantor retained annuity trusts, or GRATS, as an estate planning device for Jeanette Garrison and her husband, Dr. Joseph Garrison. In a GRAT transaction, a person transfers property to a trust and retains the right to receive a fixed annuity payment for a specified number of years. At the end of the trust term, the property remaining in the trust either goes to the named beneficiaries or remains in trust for their benefit. The GRAT seeks to limit the grantor's transfer tax while maximizing the amount of appreciation in trust assets. (Letter from Swinton Griffith to Dennis Kelly of 11/12/93.)

From 1994 to 1995, Healthmaster was under federal and state investigation for Medicare fraud. On February 1, 1995, Jeanette Garrison transferred her stock in HLM,

Inc. and Health Care Services (HCS) to two GRATS. Phillip A. Bradley, her attorney, was designated the trustee for each GRAT. Mrs. Garrison owned 50% of the stock in both HLM and HCS, and her husband owned the other 50% of stock in each company. One of the GRATS received Mrs. Garrison's HLM stock and the other GRAT received her HCS stock. On the same date, Dr. Garrison transferred his HLM and HCS stock to two GRATS.

The beneficiaries of the GRATS are Christopher Garrison and Janece Garrison, the children of DR. and Mrs. Garrison. Dr. and Mrs. Garrison have already received annuity income from the GRATS. Christopher and Janece will receive the property remaining in the GRATS after all required payments are made to Dr. and Mrs. Garrison.

Mrs. Garrison, HLM and Master Health Plan were indicted in the U. S. District Court for the Southern District of Georgia on March 9, 1995. On June 21, 1995, Plaintiff was terminated by HHHC. Plaintiff filed the present Complaint on July 9, 1996. Mrs. Garrison and Christopher Garrison filed their Motion for Summary Judgment on March 20, 1997.

DISCUSSION

A. *Fraudulent Conveyances*

Plaintiff claims that the GRAT transactions described above constitute fraudulent conveyances under O.C.G.A. § 18-2-22. Defendants argue that they are entitled to summary judgment on this claim since Plaintiff was not one of their creditors at the time of the GRAT transactions.

O.C.G.A. § 18-2-22 states in full:

> The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:
>
> (1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property or choses in action of any description to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;
>
> (2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with the intention to delay or defraud creditors, where such intention is known to the taking parties; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid; and
>
> (3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

Plaintiff claims that the GRAT transactions violated all three subsections. However, under the wording of the statute, the Plaintiff must show initially that he was a creditor of the Defendants. As is discussed below, Plaintiff cannot satisfy this threshold element.

1. Plaintiff as Creditor

The introductory language to O.C.G.A. § 18-2-22 states in part that certain "acts by debtors shall be fraudulent in law against creditors." Thus, the statute does not apply unless a debtor-creditor relationship exists.

There is no such relationship here. It does not appear that the Defendants owe the Plaintiff any money. The Plaintiff is not a claimholder against the Defendants by way of a tort action, since his tortious interference and RICO claims are meritless. The Plaintiff does not offer any other grounds establishing the required debtor-creditor relationship.

Under certain circumstances a plaintiff with an unliquidated claim may pursue a fraudulent conveyance claim. In *McVeigh v. Harrison*, 185 Ga. 121, 194 S.E. 208 (1937) the plaintiff sued the Defendants for the wrongful death of her child which occurred on March 28, 1936. Six days after the death of the child, one of the defendants transferred realty and personality to various family members. The plaintiff included in her complaint a fraudulent conveyance claim based on these transfers. The court held that, although technically not a "creditor," the plaintiff could sue the defendant and his grantees for fraudulent conveyance because the defendant transferred property *after the commission of the tort. Id.* at 130-31. (emphasis added) *McVeigh* is distinguishable from this case since the GRAT transactions occurred before the commission of the alleged tort, i.e. the termination of Plaintiff. *See also Downs v. Powell*, 215 Ga. 62, 108 S.E.2d 715 (1959).

Plaintiff correctly states that "[c]onveyances may be fraudulent as to subsequent creditors, as well as to existing creditors, if made with intent to defraud." *Jones v. J.S.H. Co.*, 199 Ga. 755, 769, 35 S.E.2d 288 (1945); *State Banking Co. v. Miller*, 185 Ga. 653, 656 (7), 196 S.E. 47 (1938). This argument is inapposite here, again because it relies on a debtor-creditor relationship. The Plaintiff cannot prove this relationship under any facts presented to the Court.

Accordingly, the Plaintiff's fraudulent conveyance claim fails because he cannot show a debtor-creditor relationship, an "essential element" of his claim. *See Lau's Corp., supra.*

DECISON

For the foregoing reasons, the Court GRANTS Mrs. Garrison and Christopher Garrison's Motion for Summary Judgment. The Defendants were not debtors of the Plaintiff at the time of the GRAT transactions, and therefore are entitled to judgment as a matter of law on the fraudulent conveyance claim.

It is so ORDERED this 10th day of June, 1997.

/s/ Bernard J. Mulherin, Sr.
J.S.C.A.J.C.

(5)

Supreme Court, U.S.
FILED
JUL 24 1998
OFFICE OF THE CLERK

No. 97-1472

In The

Supreme Court of the United States

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, Individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Does loss of "at will" employment give rise to compensable damage under 42 U.S.C. § 1985(2)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption hereof.

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OPINIONS BELOW

Neither the Orders entered by the United States District Court on June 25, 1996 (J.A. 39-42) and August 13, 1996 (J.A. 45-46), dismissing the Complaint as to all Defendants (Respondents herein), nor the Per Curiam Order of the United States Court of Appeals for the Eleventh Circuit issued December 5, 1997 (J.A. 49-50), affirming the dismissals, has been reported.

STATUTE INVOLVED

42 U.S.C. 1985

Conspiracy to Interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State of Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons

within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This case was dismissed on a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The following Statement is therefore made on the basis of the allegations contained in the Amended Complaint (J.A. 17-28), which must be taken as true for this purpose.

For almost ten years preceding April 13, 1995, Petitioner Michael A. Haddle ("Haddle") was employed by Respondent Healthmaster, Inc. ("Healthmaster"), a corporation controlled by Respondent Jeannette G. Garrison ("Garrison"). J.A. 19 (paras. 7 & 9). On March 8, 1995, a

federal grand jury indicted Healthmaster, Garrison, Respondent Dennis Kelly ("Kelly") (who along with Garrison was a corporate officer and director of Healthmaster) and others on numerous Medicare fraud and other criminal charges. J.A. 19-20 (para. 12). Beginning on April 13, 1995, Haddle's employment was transferred to Healthmaster Home Health Care, Inc., a wholly owned subsidiary of Healthmaster. J.A. 19 (para. 8). In April or May, 1995, a Trustee was appointed for Healthmaster Home Health Care, Inc. by the United States Bankruptcy Court for the Southern District of Georgia, pursuant to Chapter 11 of the Bankruptcy Code, and Garrison and Kelly were banned from any participation in the affairs of Healthmaster Home Health Care, Inc., again by order of the Bankruptcy Court. J.A. 19-20 (paras. 9 & 15).

Haddle cooperated with the investigation by federal agents which led to the indictment of several Respondents and appeared pursuant to subpoena to testify before the grand jury, although his testimony was not actually taken due to the press of time. J.A. 20 (para. 14). On June 21, 1995, after Respondents became aware that Haddle would appear as a witness at the criminal trial on the indictments, Respondent J. Peter Molloy ("Molloy"), an officer and director of Healthmaster and president of Healthmaster Home Health Care, Inc., who had been retained in the latter position by the Trustee, fired Haddle. Molloy acted at the direction of Garrison and Kelly and pursuant to a prior understanding between these persons. Amended Complaint, para 16, J.A. 20 (para. 16). This was done pursuant to an agreement between Respondents to retaliate against Haddle for his cooperation with federal agents and his appearance to

testify before the federal grand jury, and in order to intimidate him and others from cooperating with federal agents or testifying in any criminal matters against Respondents, including the indictments. J.A. 21 (paras. 18 & 19).

Furthermore, Respondents also similarly caused another person (John B. O'Neal) to be terminated from his employment in retaliation for his testimony before the same federal grand jury. J.A. 23 (para. 26).

Since this case was dismissed on a motion under Rule 12(b)(6), there is little in the way of an evidentiary Record. However, in determining whether Haddle can prove any set of facts in support of his claim, it is permissible for this Court to take judicial notice of matters in the public record which support the allegations of his complaint. See, *e.g, MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (CA 9 1986), and *Hanson v. C.S.C. Credit Service*, 29 F.3d 280, 283 (CA 7 1994). Haddle's allegations were strikingly supported by an affidavit which is in the Record in this case, having been submitted before the ruling of the District Court on motion to dismiss. This affidavit was given by Robert Pittard, Human Resources Director (employment manager) for Healthmaster and subsequently for Healthmaster Home Health Care, Inc. Mr. Pittard swore that Garrison and Molloy had a conversation in his presence about how to fire Haddle in retaliation for his assistance to the Government, while making it appear that this was not the reason, and subsequently told Pittard on "a couple of occasions" that this was their desire. Pittard also swore that he met with Molloy shortly before Molloy terminated Haddle's employment, and that when he questioned the decision to terminate Haddle,

Molloy told him that protest was useless because Molloy had been instructed by "the Board" and "the attorney" to terminate Haddle. Record Docket No. 51, Exhibit 1. It is undisputed that Healthmaster Home Health Care, Inc. was under the control of the Trustee appointed by the Bankruptcy Court. No "Board" had any authority to instruct Molloy to terminate Haddle.

O'Neal, the other person named in Haddle's complaint as having been retaliated against for cooperating in the same criminal investigation and testifying before the same grand jury, has obtained a federal jury verdict and judgment for nearly $500,000, based on the anti-retaliation provisions of the False Claims Act, 31 U.S.C. Section 3730(h), against a corporation controlled by Garrison. *O'Neal v. Master Health Plan, Inc.*, Case No. CV 196-28 in the United States District Court for the Southern District of Georgia. Testimony concerning Haddle's discharge was allowed in the *O'Neal* case under Rule 404(b), Federal Rules of Evidence, upon the finding of the District Judge that the circumstances of Haddle's dismissal were sufficiently similar to those of O'Neal to meet the requirements of the rule. This judgment is now on appeal in the United States Court of Appeals for the Eleventh Circuit.

Haddle brought his own action under 42 U.S.C. 1985(2) against Garrison, Healthmaster, Molloy, and Respondent Dennis Kelly ("Kelly") (an associate of Garrison's and an officer of Healthmaster, who is also serving a federal prison sentence upon his conviction for Medicare fraud arising out of the same investigation), alleging that these defendants conspired to bring about Haddle's discharge by deceiving the Trustee, in order to effectuate retaliation against Haddle.

Haddle admitted that he was an "at will" employee under state law and that his only damages were those resulting from the loss of his job. The District Court dismissed the case on the authority of *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), which holds that loss of "at will" employment cannot be cognizable damages under 42 U.S.C. § 1985(2). J.A. 39-42, 45-46. The District Court did not reach any other issue or defense.

On appeal, the United States Court of Appeals for the Eleventh Circuit, having declined Haddle's suggestion for hearing *en banc*, affirmed the District Court's action in an unpublished opinion. J.A. 49-50.

After the dismissal of his federal case, and during this appeal, in which he argues that he has a right of action under 42 U.S.C. § 1985(2), Haddle refiled his pendent state claims (for tortious interference with contract under state law and for violation of Georgia's "RICO" statute) in a Georgia state court. The Georgia state court granted summary judgment to Respondents on these state law claims (J.A. 53-64), which was affirmed by the Georgia Court of Appeals. See Appendices B, D and F to Respondents' Motion in this Court to Dismiss Writ of Certiorari as Improvidently Granted. The state court, however, did not address whether Haddle had presented evidence sufficient to show a conspiracy, either under 42 U.S.C. § 1985 or under state law. J.A. 56-57. The state court judgment, which is based solely on its finding that Molloy had authority to discharge Haddle as an at will employee, did not by necessary implication (as Respondents incorrectly assert) find that Respondents did not conspire, intimidate or retaliate against Haddle. See

Haddle's Response in this Court to Respondents' Motion to Dismiss the Writ.

SUMMARY OF THE ARGUMENT

A. Haddle has sufficiently alleged an injury to person or property within the meaning of 42 U.S.C. § 1985. The phrase "injured in his person or property" must be construed broadly, in light of the plain words of the statute, the Congressional purpose and contemporary usage. The idea that an injury must be to a "constitutionally protected" interest is not applicable to the first clause of § 1985(2), which concerns exclusively matters of direct concern to the institutional interest of the federal government in the operation of its own court system. *Kush v. Rutledge*, 460 U.S. 719 (1972).

B. The first clause of § 1985(2) protects and is intended to protect all federal witnesses who lose their jobs as a result of attending and giving truthful testimony in federal court, not just those who have contractual security of employment. In this highly remedial statute, it would be irrational to draw a distinction between witnesses having contractual security of employment and those whose employment is more precarious, *in favor of the less vulnerable class.*

C. Even if resort to state law is required to determine whether Haddle has alleged injury to person or property within the meaning of 42 U.S.C. § 1985, nevertheless Haddle has stated a claim under the statute. Under Georgia state law and general common law principles, the economic damage flowing from loss of at will

employment is an injury to a "property right". *Troy v. Interfinancial, Inc.*, 171 Ga.App. 763, 320 S.E.2d 872 (1984) *cert. denied*. Who may be held *liable* for such a loss under 42 U.S.C. § 1985, however, is necessarily and by the plain words of the statute a question of federal law. 42 U.S.C. § 1985 provides that the injured party "may have an action for the recovery of damages occasioned by such injury *against any one or more of the conspirators*" (emphasis supplied).

D. The purposes underlying 42 U.S.C. § 1985 strongly support protecting witnesses who lose their at will employment because they have attended federal court proceedings and testified truthfully therein. It makes no sense to restrict this protection to those who have contractual rights to job security and exclude those who are at the mercy of their employers.

ARGUMENT

A. Haddle has sufficiently alleged an injury to person or property within the meaning of 42 U.S.C. 1985. The phrase "injured in his person or property" must be construed broadly, in light of the plain words of the statute, the Congressional purpose underlying the statute, and contemporary usage. The idea that an injury must be to a "constitutionally protected" interest is not applicable to the first clause of § 1985(2), which concerns exclusively matters of direct concern to the institutional interest of the federal government in the operation of its own court system.

42 U.S.C. § 1985(2) provides a civil remedy for the victim of a conspiracy "to deter, by force, intimidation, or

threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . " 42 U.S.C. § 1985(2). The statute goes on to say, in plain and understandable language, that "in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, *whereby another is injured in his person or property . . . the party so injured . . . may have an action for the recovery of damages occasioned by such injury* . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis supplied).

This remedy is made available, according to the express language of the statute, to any person "injured in his person or property". Notwithstanding this broad language, however, the Court of Appeals for the Eleventh Circuit ruled in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) that a federal witness, who is the victim of a successful conspiracy to have him fired from his job in retaliation for his testimony, has no cognizable damages under this statute for being fired, if his job was one which was terminable by his employer "at will". The Court of Appeals followed this precedent in this case, applying it even in this suit which is not against Haddle's employer, but rather against third parties who conspired to cause his employer to fire him. It did so even though Georgia law is clear that an employee has a "property right" in his at will employment (although the employer itself is immune under state law from a suit by the at will

employee). *Troy v. Interfinancial, Inc.*, 171 Ga.App. 763, 766, 320 S.E.2d 872, 877 (Ga. App. 1984), *cert denied*.

The Eleventh Circuit in *Morast* disposed of the at will employee's § 1985(2) claim in three sentences:

> "Finally, to make out a cause of action under § 1985(2), the plaintiff must have suffered an actual injury. Because Morast was an at will employee . . . [citation omitted], he had no *constitutionally protected* interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute."
>
> – 807 F.2d at 930 (emphasis supplied)

It appears that the Eleventh Circuit failed to consider the difference between an action under subsection 3 of § 1985 (or that portion of subsection 2 which addresses state judicial proceedings) and an action under that portion of subsection 2 that addresses the integrity of federal proceedings. This distinction was clearly made by this Court in *Kush v. Rutledge*, 460 U.S. 719 (1983). The issue in interpreting § 1985(2) is not what is a "constitutionally protected" interest, but rather merely what the reach of this federal statute, enacted to protect the integrity and operation of the federal courts, is under its own wording.

The Eleventh Circuit stripped the protection of the statute from those most vulnerable and most in need of it: employees who hold their livelihood "at the will" of their employers, so that those against whom they testify have only to persuade their employers to discharge them from their precarious employment, in order to inflict tremendous injury. There is no justification for this perverse

result, either in the plain language of § 1985(2), in its legislative history, or in public policy.

The allegations of the Amended Complaint herein, as recounted in the Statement of the Case above, show clearly that Haddle has alleged all the elements of a claim under § 1985(2). He alleges that he attended the grand jury proceedings in the criminal case which resulted in the indictments of Respondents other than Molloy, and that this investigation was also directed against Molloy. He alleges further that Respondents learned that he would appear as a witness at the resulting federal trial. He alleges that, in order to intimidate him and others from cooperating with the Government and in retaliation for his attendance at the grand jury and his projected testimony at the trial, Respondents conspired to and in fact did have him fired from his employment at Healthmaster Home Health Care, Inc., a Chapter 11 bankrupt. At the time Haddle was terminated, Garrison, Kelly and Healthmaster ostensibly had no connection with his employer, having been barred from such connection by the Bankruptcy Court. Molloy had been retained in the position of chief executive officer of the bankrupt corporation by the Trustee. Haddle alleges that Respondents, acting pursuant to a preconceived plan, caused his dismissal from the employment of the bankrupt corporation, through Molloy, who acted not in the interest of the bankrupt corporation but in his own personal interest and at the direction of Garrison, Kelly and Healthmaster, the federal indictees.

This Court has recognized in a number of contexts that the Civil Rights Act of 1871, of which what is now 42 U.S.C. § 1985 is an important part, should be "accord[ed]

a sweep as broad as its language . . . " *United States v. Price*, 383 U.S. 787, 801 (1966). One of these contexts is in the scope of the interests sought to be protected. "[T]he rights that Congress sought to protect in the Act of 1871 [including that portion now codified as 42 U.S.C. § 1985] were described by the chairman of the House Select Committee that drafted the legislation as "the enjoyment of life and liberty, with the right to acquire and possess property *of every kind* . . . " *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972) (emphasis supplied). Nevertheless, the court in *Morast* concluded that the interest of a witness who is an at will employee in keeping his job is not such a property interest as is entitled to the protection of this section of the statute.

This Court has also recognized that § 1985(2) itself consists of more than one part, and that these parts have different functions. This case concerns that part of § 1985(2) which proscribes intimidation of or retaliation against any "party or witness" in any court of the United States.

Much about the scope and purpose of this part of 1985(2) was settled in *Kush v. Rutledge*, 460 U.S. 719, (1983). In that case this Court recognized and distinguished the function of § 1985(2) in protecting the processes of the federal courts, including protection of federal witnesses, from other functions of 1985 which might involve the states and the state courts. Emphasizing that protection of federal witnesses is a purely federal interest which does not implicate the rights of the states or the reach of federal power into areas traditionally reserved to the states, this Court held that an allegation of conspiracy to intimidate or retaliate against a federal

witness states a claim under § 1985(2), even if no class-based animus is alleged, as is required to state a claim for interference with state court proceedings.

An action such as this is favored and is not subject to the constraints that govern actions, such as those under § 1985(3) or under the second clause of 1985(2). This distinction made by this Court in *Kush* was based on the plain language of the statute. § 1985(3) and the second clause of § 1985(2) both contain limiting language referring to an intent to deprive persons of the equal protection of the laws, a limitation which is absent from the first clause of § 1985(2), the basis of Haddle's claim.

In *Kush*, plaintiffs had brought an action under § 1985(2) alleging that certain parties had "engaged in a conspiracy to intimidate and threaten various material witnesses in order to prevent them from testifying "freely, fully and truthfully" in his lawsuit in federal court. 460 U.S. at 721. The Court of Appeals below had distinguished those parts of the Civil Rights Act of 1871 relating to "obstruction of justice at the state level," from others relating to "interference with federal litigation," noting that the latter are "institutionally linked to federal interests." 460 U.S. at 722, 725. This Court upheld the Court of Appeals in its determination that, where intimidation of federal witnesses is involved, the statute does not require race or class based animus, as it does in other actions such as those alleging intimidation in state court proceedings or other contexts, emphasizing the more direct federal interest in protecting federal witnesses.

Kush signaled this Court's view that actions under § 1985(2) should be given a much broader construction

than actions under § 1985(3), in order to vindicate and protect the important and unique federal interest in having persons attend and testify in federal court proceedings. The question now presented is whether the protection afforded to United States citizens in such a case depends on whether their employment is "at will" under state law.

As the Court of Appeals for the First Circuit observed in *Irizarry v. Quiros*, 722 F.2d 869 (1983), the *Kush* decision rests "on the plain language of the statute and on the premise that congressional power therefor arose not from the fourteenth amendment and notions of equality, but, rather, from specific federal power to protect the processes of federal courts and the exercise of federal rights." 722 F.2d at 871. Since there can be no question about the extent of Congressional power to provide a remedy for federal witnesses injured as a result of their exercise of the right and duty to give truthful testimony in federal court proceedings, the issue in this case is simply one of statutory construction.

The narrow (but vitally important) issue of statutory construction now before this Court is this: does "injured in his property" encompass the plight of one who has been fired from his at will employment in retaliation for his testimony in federal court? Having given a remedy to anyone "injured in his person or property" by intimidation or retaliation against such person as a federal witness, would Congress have intended to exclude from the protection of the statute those who lose their jobs for testifying in federal court, solely because their employment is "at will"?

The phrase "injured in his person or property" is used only twice in the current United States Code, once in § 1985 and once in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (enacted in 1977), where it serves, as it does in § 1985, to specify who may sue for damages for breach of the statute. In the latter act, the phrase has not been construed in a reported case. The phrase in its nominative form, "injury to person or property", however, is used frequently in federal statutes creating private remedies of various sorts. Respondent has found no interpretation of this language in the federal Code relating specifically to at will employment.

The very similar phrase "injured in his [or, sometimes, "its"] business or property", is also frequently used in Congressional enactments as a means of specifying who may sue in a private action. The most familiar of these uses is in the private remedy provision of the Clayton Antitrust Act, 15 U.S.C. § 15.

In construing the word "property" as it appears in § 15 of the Clayton Act, this Court has given it the most comprehensive meaning possible:

> [T]he word "property" has a naturally broad and inclusive meaning. In its dictionary definition and in common usage "property" comprehends anything of material value owned or possessed. See, e.g., Webster's Third New International Dictionary 1818 (1961). Money, of course, is a form of property."
>
> – *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

This Court in *Reiter* further observed, moreover, that the phrase "injured in his business or property" is nevertheless narrower than it might have been, in that there is no reference to injury to the person. 442 U.S. at 339. In § 1985(2), by contrast, the reference is to the whole gamut of injuries to persons *or* property.

Of course this Court did not consider it necessary in *Reiter* to ask whether the interest being protected (presumably the interest of the plaintiffs in being able to make profits through fair business competition) was a "constitutionally protected" interest. It sufficed that Congress had legislated to protect this interest, just as it has legislated in § 1985(2) to protect the well-being of federal witnesses. The interest of a market competitor in making a profit is certainly a less obvious one than that of an at will employee in his job and livelihood. It would be difficult to conceive of it as more "constitutionally protected". This, however, was not the question. The issue in *Reiter* was simply, as it should be here, what Congress meant by the word "property". Just as the plaintiffs in *Reiter* suffered pecuniary loss from anti-competitive practices, so in this case Haddle has suffered pecuniary loss (through loss of his job) from proscribed retaliation against him.

There can be no serious doubt that the phrases "injury to person or property", "injury to person and property" and "injured in his person or property" all express the same thought: that of any injury other than a breach of contract. As such, it was frequently used in the nineteenth century, as it is today, to designate the widest possible range of tortious injuries.

The fact that an at will employee's employer may have a privilege to discharge him at any time, without cause, does not mean that the employee has no protectible interest in his continued employment. This point was clearly made by the Georgia Court of Appeals in *Troy v. Interfinancial, Inc., supra,* 171 Ga. App. at 766, 320 S.E.2d at 877: "An employee, generally, has a *property right* in his contract of employment (written or verbal even if it is at the will of the employer) which may not be unlawfully interfered with by another" (emphasis supplied). Chief Justice Charles Evans Hughes of this Court was stating an acknowledged proposition when he observed that the fact that an employment contract is "at will" does not mean that an employee has no protectible rights thereunder:

> It is said that the bill does not show an employment for a term, and that under an employment "at will" the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is "at will".
>
> – *Truax v. Raich,* 239 U.S. 33, 38, (1915).

It should be clear that the phrase "injured in his person or property" is intended to specify the broadest

possible range of injuries. "[T]orts are divided into two general classes, namely, "property torts" which involve injury or damage to property, whether realty or personalty, and "personal torts" which involve injuries to the person, whether to the body, reputation or feelings." *Travelers Indemnity Co. v. Chumbley,* 394 S.W.2d 418 (Mo.App. 1965), *rehearing denied.* It was apparently common in the nineteenth century, as for that matter it is now to some extent, to divide all torts into those committed upon the person and those committed upon property. Thus, for instance, in introducing the subject of tort law the seminal Georgia Code of 1860 (the work of one of the earliest codifiers of substantive common law, T.R.R. Cobb, re-enacted verbatim in this respect in 1873) states that "[a] *tort* is a legal wrong committed upon the person or property independent of contract". Georgia Code of 1873, § 2951 (§ 2900 of the Code of 1860).

Indeed, the phrase "injury to person or property" has been construed specifically to include economic damage such as lost wages and benefits that flow from lost employment, including loss of at will employment. *Scott v. Prudential Outfitting Co, Inc.,* 92 Misc. 195, 155 N.Y.S.2d 497 (Supr.Ct.A.D. 1915). *Crapanzano v. Uneeda Credit Clothing Stores, Inc.,* 32 N.Y.S.2d 269 (Mun. Ct.N.Y., 1941) (at will employment). *Tennessee v. Smith,* 197 Tenn. 350, 273 S.W.2d 143 (Tenn. 1954). *Delaware v. Kramer,* 31 Del. 454, 115 A. 8 (1921).

In *Crapanzano, supra,* a court with jurisdiction over all "injuries to person or property", with certain stated exceptions, was called on to determine whether loss of at will employment fell within its purview. It had no trouble

in finding that loss of at will employment is an injury to property.

In *Kramer v. Delaware, supra,* a Delaware court was called to construe a statute criminalizing threats "to do injury to any person or property". The threat charged was that "if the said Walsh did not pay a sum of money to accused, he, the said Walsh, would be deprived of the employment in which he, at the time alleged in the indictment, was then and there engaged." Against the claim that the statute was restricted to physical damage to person or property, the court found that the terms of the section were "most comprehensive" and that "[a] statement made by one person to another unlawfully threatening such other with the loss of present employment, would constitute a threat to do injury to the property of such other person, within the intent and meaning of the words of the statute." 115 A. at 9, 11.

The juxtaposition of the concepts of injury to person and injury to property is significant as showing that Congress intended a very wide reach for the statute. To compare great things to small, this Court's construction of the phrase in the Civil Rights Act of 1871 should be the same as that expressed by the court in *Scott v. Prudential Outfitting Co., supra,* an at will employment case decided in 1915. In *Scott,* the New York court observed that "the language of the [New York statute], "an action to recover damages for a personal injury, * * * or an injury to property," indicates to my mind an intention to include practically all actions for damages except those specifically named." 92 Misc. at 197, 155 N.Y.S.2d at 498. The fact that the plaintiff's employment was at will, although

specifically noted by the New York court, made no difference in its analysis.

The coupling of the concepts of injury to person and injury to property merely emphasizes the broad scope of injuries Congress intended to redress. The damages resulting from loss of employment, including loss of at will employment, although generally characterized by courts as a form of injury to property, can in fact be characterized as injuries to person, as was done in *Stringer v. Board of Trustees of Sparrow Hospital,* 62 Mich.App. 696, 233 N.W.2d 698 (1975) (tortious conspiracy to cause suspension of a physician's hospital privileges). The question seldom arises, and need not arise in this case, as to which covers loss of at will employment, because ordinarily the two concepts are joined, with the intent that together they should describe all tortious injuries whatsoever. The two parts of Congress' language here under consideration, "injured in his person or property", are thus complementary and express Congress' determination to provide a comprehensive remedy.

An examination of the use of the concept of injury to property, in connection with that of injury to person, clearly supports the conclusion of the United States Court of Appeals for the First Circuit when, interpreting this provision, it observed that "[p]roperty here must include any economic damage that would be recognized in an ordinary tort suit." *Irizarry v. Quiros,* 722 F.2d 869, 871 (CA 1 1983). The Court of Appeals for the Ninth Circuit, refusing to follow the Fifth Circuit *Morast* decision, has endorsed this conclusion and specifically found that loss of *at will* employment is compensable damage under § 1985(2):

§ 1985(2) contains two clauses that give rise to separate causes of action. The first clause concerns access to *federal* courts, giving rise to a cause of action where two or more persons in any State or Territory conspire [A] to deter, by force, intimidation, or threat, any party or witness *in any court of the United States* from testifying to any matter pending therein, freely, fully and truthfully, or [B] *to injure such party or witness in his person or property on account of his having so attended or testified* . . .

The district court dismissed Portman's complaint on the basis of the second and fourth elements, concluding "a cause of action for denial of access to the courts was not meant to provide a remedy for repercussions such as a salary denial or termination." We disagree with this conclusion. Although this court has not addressed the question, other circuits have concluded that plaintiffs who 'have proved that they were denied [employment opportunities as a result of a conspiracy] because they previously had instituted legal actions to vindicate their federal rights' have made out claims under § 1985, even where they had no constitutionally protected property interest in the job. *See Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983); *see also Wright v. No Skiter Inc.*, 774 F.2d 422 (10th Cir. 1985) (plaintiff alleging that the defendants conspired to defeat his low bid for a contract in retaliation for his bringing a federal suit states a claim under § 1985(2)). As the court in *Irizarry* explained, " '[p]roperty here must include any economic damage that would be recognized in an ordinary tort suit.' " *Id.* We see no reason to depart from the approach of those cases, and

conclude that the district court erred in dismissing the claim on this basis.

– *Portman v. County of Santa Clara*,
995 F.2d 898, 909-910 (CA 9 1993).

In enacting this particular portion of § 1985(2), based on its undoubted power to protect litigants and witnesses in federal court proceedings, the 42nd Congress used the most inclusive language with which it was familiar to specify who might have its protection and remedy.

The part of § 1985(2) with which this case is concerned, relating to protection of federal court processes, was enacted with little discussion. With reference to this portion of the statute, the reserved rights of the states received and needed no consideration at all. Whereas other portions of the Ku Klux Klan Act were extensively argued, and eventually modified, because of concerns about states' rights (as this Court has also repeatedly observed), the portion protecting federal litigants, witnesses, jurors and others from intimidation or retaliation because of their participation in federal judicial proceedings was never controversial. The reason is simple. All parties recognized that it is inherent in the nature of any judicial system that it be able to protect those who participate in it. In so doing, Congress was acting in the clearest fullness of its sovereign powers. It used the language which had developed in Anglo-American law to describe the full range of injuries resulting from tortious conduct. Its words must be construed as broadly as their common law background, the usage of the period and subsequent periods, the manifest intent of Congress, and the mischief sought to be remedied require.

Every witness should be protected from retaliatory loss of his job by 42 U.S.C. § 1985(2). Haddle, like every other worker in America, is protected by federal law against being intimidated or retaliated against, in his employment or otherwise, for exercising a federal right. To hold otherwise would be to upset one of the clearest and best established principles of civil rights law. Where an employee is discharged for a federally proscribed reason, such as to intimidate and retaliate against him for testifying in a federal court proceeding, he does have a legally cognizable injury. No one would dream of applying such a principle to strip "at will" employees of protection against racial or other invidious discrimination. Nor is there any reason to give less protection to federal witnesses.

An at will employee, who holds his job at the mercy of his employer, cooperates as a federal witness before a federal grand jury in a federal investigation of criminal conduct by his former employer and officers of his former employer. In response, these persons successfully conspire to have him discharged from his at will employment in retaliation for his cooperation with the government, his appearance to testify before the grand jury and his expressed intention to testify at the criminal trial. They are able to do this because one of them is in effective control of the witness's present employer. Their conspiracy is evidenced by direct testimony. Yet the Eleventh Circuit has ruled that this witness has no remedy under federal law for violation of his federal right by these persons, because his employment was terminable at will under state law. The Ninth Circuit has decided to the contrary. The First Circuit clearly would decide to the

contrary. This Court should resolve this conflict in favor of protection of federal witnesses and the integrity of the administration of justice in the federal courts, in line with the purpose and wording of 42 U.S.C. § 1985(2).

B. In the first clause of § 1985(2), Congress intended to protect all federal witnesses who lose their jobs as a result of attending and giving truthful testimony in federal court, not just those already protected by state contract law

The legislative history of the Civil Rights Act of 1871 is replete with evidence of Congress' concern that freedmen and others attempting to exercise their federal rights were being fired from their jobs and deprived of their livelihoods as a consequence. See, *e.g.*, Congressional Globe, 42nd Congress, First Session Appendix pages 293 (Democratic club resolves that "no man should employ colored men who voted the Republican ticket"; "if they voted the Radical ticket, they should not live on their land or be employed by them in any way . . . as they were dependent upon us for everything – land, employment and sustenance . . . "), 294 (witness discharged from his employment for voting the Republican ticket), 295 (persons would be "turned off and left to starve" and "turned away from the houses they occupied as employees".) Any general history of the Reconstruction period will mention the role of economic coercion, including discharge from employment, in attempts to subvert federal authority in the occupied states. For instance, John Hope Franklin notes that "[b]y discharging or threatening to discharge Negro employees who persisted in participating in politics, [white employers] could reduce the Negro electorate

to a minimum." Franklin, Reconstruction After the Civil War (1961), p. 173.

Admittedly, most of this concern seems to have been focused on employment reprisals carried out against persons who dared to exercise their right to vote, or who failed to vote "correctly". Considering, however, that the language giving a private claim to any person "injured in his person or property" is common to all the outrages which § 1985 proscribes, this makes no difference. The point is that Congress was well aware, in enacting § 1985, that one of the most potent and often employed weapons of retaliation against those exercising federally protected rights, including the right and the duty to testify in federal court proceedings, was deprivation of employment. It cannot be seriously doubted that most of those so discriminated against were what are now called "at will" employees, too weak in bargaining power and social and economic position to have obtained contractual guarantees of employment. It is simply impossible to imagine that the 42nd Congress, in protecting those who were injured in their person or property because of their having been witnesses in federal court proceedings, intended to exclude from this remedial measure all those who had lost their jobs but had no contractual security of employment.

C. Even if resort to state law is required to determine whether Haddle has alleged injury to person or property within the meaning of the statute, Haddle has stated a claim, because (1) under Georgia law, economic damages resulting from loss of at will employment are an injury to a "property interest", and (2) the question of who may be *liable* for such an injury remains, necessarily and by the words of the statute itself, a question of federal law

Haddle anticipates that Respondents will argue that, since the Georgia courts have (thus far) refused to give Haddle a remedy against these Respondents on state law tort theories, Haddle can have no remedy in federal court under § 1985(2).

Haddle believes that the state court order dismissing his state law claims for tortious interference and under Georgia's "RICO" statute is clearly contrary to established Georgia precedent. His petition for certiorari is now pending before the Georgia Supreme Court. Be that as it may, the dismissal of Haddle's suit by the Georgia state courts, even if allowed to stand by the Georgia Supreme Court, should not adversely affect the disposition of this action. In fact, this would only reinforce the need for a federal remedy for this variety of intimidation of a federal witness.

Haddle's claims herein are against persons other than his employer. This in itself would serve to distinguish his case from any case denying relief to an intimidated witness against his at will employer. Even if Haddle's case were against his employer, however, the fact that it would be barred by Georgia state law if cast under a state law theory should not foreclose a federal remedy. This would

not change the fact that Haddle had a vital property interest in his continued employment, which can be and is protected by federal law in this case.

The state trial court's order is based on its finding that the Respondents, even those who were concededly not employed by Haddle's employer at the time of his discharge, are entitled to share in the protection from suit granted by Georgia law to an "at will" employer. It is not based on any theory that Haddle had no property right in his continued employment. In fact, it recognizes that he did. This recognition is indeed compelled by existing Georgia law, including *Troy v. Interfinancial, Inc.*, 171 Ga.App. 763, 766, 320 S.E.2d 872, 877 (1984), *cert. denied*, as quoted above in Part A: "An employee, generally, has a *property right* in his contract of employment (written or verbal even if it is at the will of the employer) which may not be unlawfully interfered with by another." The state court's order simply finds that none of the Respondents, under the circumstances of the case, can be held legally responsible *under a state law theory*.

Whatever else about the history of the Civil Rights Act of 1871 may be debated, it is incontrovertible that it was passed because of Congressional dissatisfaction with the scope and efficacy of state law remedies. It would be an astounding reversal for this Court to hold that Haddle has no federal remedy for the retaliation visited upon him for his exercise of his federal right and duty to testify in a federal proceeding, simply because the courts of the State of Georgia will afford him no remedy. In enacting the Ku Klux Klan Act, Congress was concerned with, among other things, the failure of the states to give a remedy for injuries inflicted on persons exercising certain

important federal rights. In the case of the right (and duty) to testify in federal court, at least, some states still refuse to grant relief in an important class of cases.

Suppose that, even in § 1985(2), state law must determine whether Haddle has been "injured in his person or property". There can be no doubt that he has been, because he has suffered economic loss by being deprived of his at will employment, which is *expressly* characterized by Georgia law as a "valuable property right". *Troy v. Interfinancial, Inc., supra*, 171 Ga.App. at 766, 320 S.E.2d at 877. The function of state law ends when this determination is made. Whether any particular person can be held liable under 42 U.S.C. § 1985 for a conspiracy to injure this right is surely a question of federal law.

Moreover, it is one that the express wording of the statute answers: any person injured *"against any one or more of the conspirators"*.

Federal law (§ 1985 itself) specifically says that the victim of a conspiracy to injure him in his person or property shall have an action "against *any one or more* of the conspirators" (emphasis supplied). Even if under st law various participants in a conspiracy would be im une from suit, either because they were the plaintiff's at will employer or because they were so identified with the employer as to partake of its immunity, there is no reason that this immunity should be imported into federal law, when the federal statute, § 1985, plainly provides that *all* conspirators shall be liable. None of Respondents herein, other than Molloy, were even officers or employees of Haddle's employer.

In some states, an employer is free as a matter of state law to fire his at will employees simply for testifying against him (or anybody else) in court, state or federal. Yet a federal statute, enacted to preserve the integrity of the federal courts, declares that "any person" "injured in his person or property" by way of retaliation for his testimony in federal court may obtain redress in federal court. This statute should not be judicially limited so as to exclude from its operation the most vulnerable class of persons who may suffer from retaliation, that is, those who hold their very livelihoods on sufferance. The only shadow of justification for such a procedure emanates from the idea that at will employment is not "property". Yet, as shown above, this idea is simply wrong. Georgia law expressly describes a person's interest in his at will employment as a "property interest". Furthermore, cases which have considered whether at will employment is "property" have uniformly concluded that it is.

Even if the range of interests protected by Congress, in its attempt to insure the integrity of federal courts, were to be limited by state law, it still does not follow that those who may be held liable for invading that integrity must also be limited by state law. In fact, the plain words of § 1985(2) show the contrary, when they provide that, if a conspiracy is shown to intimidate or retaliate against a federal witness, the injured party may have a remedy against "any one or more of the conspirators".

D. Public policy strongly supports protecting witnesses who lose their at will employment because they have attended federal court proceedings and testified truthfully therein.

Testifying in a federal trial is a right protected under the United States Constitution. Absent this right, "the foundations of federal justice would be undermined." *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir. Unit B, 1982), *quoting United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974), *cert. denied*, 419 U.S. 826 (1974).

Federal witnesses, who have both a right and a duty to give truthful testimony in federal court, should not be required to do so only upon pain of the threat of losing their livelihoods, even if they belong to that large class of persons who have been unable to secure contractual rights to employment. They should not be relegated for redress to the contradictory court decisions of the fifty states. Neither principles of statutory construction, nor the purpose and history of the Civil Rights Act of 1871, nor sound policy furnishes any basis for such an unjust result.

The Eleventh Circuit precedent used to dismiss Haddle's suit stripped the protection of 42 U.S.C. § 1985(2) from those most vulnerable and most in need of it: employees who hold their livelihood "at the will" of their employers, so that those against whom they testify have only to persuade their employers to discharge them from their precarious employment, in order to inflict tremendous injury. The effect of this holding is that a witness in a federal criminal proceeding, who is protected against being interfered with or retaliated against by a

specific provision of federal law, 42 U.S.C. § 1985(2); has no federal remedy if he is fired from his job for being a witness, if his employment is terminable "at-will" under state law. 42 U.S.C. § 1985(2), a portion of the Civil Rights Act of 1871 which was passed expressly to give a remedy to those injured by intimidation and retaliation for exercising their federal right and duty to give evidence in federal court proceedings, is thus rendered of no effect to remedy this devastating and most likely of harms. This seriously affects the integrity of the federal judicial system and the administration of federal law.

The arbitrary and irrational line drawn by the Court of Appeals for the Eleventh Circuit would balkanize federal protection of witnesses in those cases where it is most vital. Many states have recognized that an at will employee's property interest in his job justifies an action against his employer, despite his at will status, when the employee is fired for participating in various ways in court or administrative proceedings. See, *e.g., Petermann v. International Brotherhood of Teamsters, etc.*, 174 Cal.App. 2d 184, 344 P.2d 25 (2d Dist. 1959), *Sides v. Duke Hospital*, 74 N.C.App. 331, 328 S.E.2d 818 (1985) (refusal of employee to commit perjury), and *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P.2d 625 (1982) (employee discharged to prevent testimony before grand jury) . Similarly, applying general maritime law, the United States Court of Appeals for the Fifth Circuit has recognized the injustice of the strict at will theory, finding that a seaman discharged for exercising his federal right to file a lawsuit under the Jones Act has a claim for damages under general maritime law. *Smith v. Atlas Boat Service, Inc.*, 653

F.2d 1057 (Fifth Cir. 1981). Nevertheless, other states continue firmly to refuse to recognize any exceptions to the immunity of the employer of an at will employee. See, *e,g., Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983), and *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978).

Are the states to set the parameters of federal protection for federal witnesses in federal proceedings, or limit the relief availabe to those injured by the serious offense against the United States of intimidation of or retaliation against witnesses in its courts? Will the at will employee in California, North Carolina or Hawaii be protected, while his counterpart in New York or Georgia will not be? This situation would be intolerable. Fortunately, there is no justification for it in the statute being construed.

CONCLUSION

Haddle respectfully requests that the plain language of 42 U.S.C. § 1985 be given effect, that this Court hold that loss of at will employment is compensable damage under 42 U.S.C. § 1985(2), and that the decision of the United States Court of Appeals for the Eleventh Circuit in this case be reversed and remanded to the Court of Appeals with instructions to return the consolidated appeals (Nos. 96-8856 and 96-9072 in the Court of Appeals*) to the United States District Court for the

*By printer's error, one of the two caption pages for the Opinion of the Court of Appeals below was left out of Appendix A to Haddle's Petition for Certiorari herein. It is included in the Joint Appendix herein.

Southern District of Georgia for further proceedings not inconsistent with the Opinion of this Court.

Respectfully submitted,

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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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INTRODUCTION

Pursuant to Supreme Court Rule 21, Respondents Jeanette G. Garrison, Christopher Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and G. Peter Molloy, Jr. (collectively "Respondents") file this Motion for Dismissal of the Writ of Certiorari. The statute upon which Petitioner Michael A. Haddle's ("Petitioner") appeal is based, 42 U.S.C. § 1985(2), requires proof of certain factual elements, such as a conspiracy, intimidation, and retaliation, which, until now, have been assumed to exist for purposes of Petitioner's appeal. However, after this Court granted the Petition for Writ of Certiorari, the Court of Appeals of the State of Georgia affirmed the granting of summary judgment in favor of Respondents and against Petitioner in a related state case between the same parties. The state law claims on which Respondents were granted summary judgment were based on the same nucleus of facts as this case and the trial court necessarily determined that Respondents did not conspire, intimidate, or retaliate against Petitioner. Federal courts must give full preclusive effect to such factual findings under 28 U.S.C. § 1738. Therefore, because the Georgia state courts have already decided factual issues that necessitate a finding for Respondents on Petitioner's 42 U.S.C. § 1985 claim, this Court should dismiss the Writ of Certiorari as improvidently granted.

STATEMENT OF THE CASE

Petitioner originally filed a complaint (the "Federal Complaint") in federal district court against Respondents and others asserting a claim under 42 U.S.C. § 1985(2) and Georgia state law claims, including a claim under the Georgia Racketeering Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. ("Georgia RICO"). Both the 42 U.S.C. § 1985(2) claim and the state law claims were based on the same statement of facts in the Federal Complaint. The United States District Court for the Southern District of Georgia dismissed the § 1985(2) claim for failure to state a claim upon which relief can be granted, based on the "clear language" of direct precedent. *Haddle v. Garrison*, No. CV196-29 (S.D. Ga. June 25, 1996) (attached at Appendix A) (citing *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987)). Additionally, the district court declined to retain supplemental jurisdiction over the state law claims and dismissed the state law claims without prejudice.

Petitioner then refiled the state law claims in the Superior Court of Richmond County, Georgia. With the exception of the 42 U.S.C. § 1985(2) claim, Petitioner's state court complaint (the "State Complaint") was virtually identical to the original Federal Complaint. On June 10, 1997, the Richmond County Superior Court granted summary judgment to Respondents on all of Petitioner's claims. *Haddle v. Garrison*, No. 96-RCCV-572 (Superior Court of Richmond County, Georgia, June 10, 1997) (attached at Appendix B).

Six months later, the United States Court of Appeals for the Eleventh Circuit upheld the district court's dismissal of Petitioner's § 1985(2) claim in an unpublished per curiam opinion. *See Haddle v. Garrison*, No. 96-9072 (11th Cir. Dec. 5, 1997) (attached at Appendix C). This Court then granted the Petition for a Writ of Certiorari

related to Petitioner's § 1985(2) claim on May 26, 1998. On June 16, 1998, since the granting of certiorari, the Georgia Court of Appeals issued its decision affirming the Richmond County Superior Court's grant of summary judgment in favor of Respondents. *Haddle v. Garrison*, No. A98A0020 (Ga. App. June 16, 1998) (attached at Appendix D). Petitioner's Motion for Reconsideration to the Georgia Court of Appeals was denied on July 7, 1998. *Haddle v. Garrison*, No. A98A0020 (Ga. App. July 7, 1998) (attached as Appendix E).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DISMISSED

A. The Full Faith and Credit Statute.

The full faith and credit statute provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. This Court has held that:

> [i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984).

The mandates of 28 U.S.C. § 1738 control unless the statute at issue contains an express or implied repeal of

§ 1738. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468, 102 S. Ct. 1883, 1890 (1982). The plain language of 42 U.S.C. § 1985(2) does not express or imply any intent to modify 28 U.S.C. § 1738.

Indeed, several circuit courts of appeals have applied preclusion principles to 42 U.S.C. § 1985 claims. *See, e.g., Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1036 (9th Cir. 1990) (§ 1985(2) claim); *Gardner v. Parson*, 874 F.2d 131, 142 (3d Cir. 1989) (§ 1985(3)); *Windsor v. The Tennessean*, 719 F.2d 155, 162 (6th Cir. 1983) (§ 1985(1) claim); *LaRocca v. Gold*, 662 F.2d 144, 148 (2d Cir. 1981) ("We see no reason why [28 U.S.C. § 1738] should not also apply to suits under § 1985."). According preclusive effect to state court decisions under the doctrine of collateral estoppel:

> not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system.

Allen v. McCurry, 449 U.S. 90, 95-96, 101 S. Ct. 411, 415 (1980).

B. Collateral Estoppel Under Georgia Law.

Collateral estoppel, also known as estoppel by judgment under Georgia law, "precludes readjudication of an issue previously adjudicated between the parties or their privies in another action." *Department of Human Resources v. Fleeman*, 263 Ga. 756, 757, 439 S.E.2d 474,

475 (1994); *see also O.C.G.A* § 9-12-40 (1993). The doctrine applies "where an issue of fact or law is actually litigated and determined by a valid judgment, *and* the determination is essential to the judgment." *Kent v. Kent*, 265 Ga. 211, 211, 452 S.E.2d 764, 766 (1995) (citing Restatement (Second) of Judgments § 27 (1982)). These preclusion doctrines reinforce the "absolute conclusiveness of a judgment of a court of competent jurisdiction upon the parties," such that a court's judgment is "regarded as binding in every other court" until it is reversed. *Jim West Housemovers v. Cobb County*, 259 Ga. 314, 315, 380 S.E.2d 251, 252 (1989) (quoting *McRae v. Boykin*, 73 Ga. App. 67, 72, 35 S.E.2d 548 (1945)).

The Georgia Supreme Court stated that: "estoppel by judgment applies as between the same parties upon *any cause of action* to matters which were directly decided in the former suit." *Jim West Housemovers,* 259 Ga. at 314, 380 S.E.2d at 252 (quoting *Roddenberry v. Roddenberry*, 255 Ga. 715, 717, 342 S.E.2d 464 (1986)) (emphasis added). Importantly, although identity of the parties in the two actions is necessary, identity of the *claim* is not required for the collateral estoppel doctrine to apply. *Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 867, 463 S.E.2d 5, 7 (1995) ("[S]o long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim."). The prior judgment will be conclusive:

> not only of the thing directly decided, but of every fact which was essential to the adjudication. [Cit] 'Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded.'

Usher v. Johnson, 157 Ga. App. 420, 422, 278 S.E.2d 70, 72 (1981) (quoting *Callaway v. Irvin*, 123 Ga. 344, 351(4), 51 S.E. 477 (1905)).

There is no question that Petitioner's Federal and State Complaints contain identical parties. Furthermore, summary judgment is a ruling on the merits in Georgia. *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 604, 203 S.E.2d 173, 176 (1974) ("[I]t is evident that an adjudication on summary judgment is an adjudication on the merits of the case."). Finally, the grant of summary judgment by the Richmond County Superior Court "shall be conclusive between the same parties . . . until the judgment is reversed or set aside." O.C.G.A. § 9-12-40; *see also McCracken v. City of College Park*, 259 Ga. 490, 491, 384 S.E.2d 648, 650 (1989).

The important determination, then, is whether the factual issues necessarily decided by the Georgia courts are the same as the factual issues underlying the case presently before this Court. Petitioner, in his 42 U.S.C. § 1985(2) claim, alleged that Respondents conspired to deter Petitioner, through "force, intimidation, or threat," from assisting with a federal investigation and to retaliate against Petitioner for his cooperation with federal authorities. Federal Complaint, ¶¶ 18, 20 (attached at Appendix F). Petitioner alleged that the act of deterrence and retaliation against him was the termination of his at will employment. Federal Complaint ¶¶ 18-19. An

essential element of both the "deterrence" and the "retaliation" prongs of a 42 U.S.C. § 1985(2) claim is the requirement of a conspiracy -- an agreement between two or more persons. *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126, 1129 (10th Cir. 1994). Therefore, if Petitioner cannot prove either intimidation or retaliation, in addition to a conspiracy, Petitioner's 42 U.S.C. § 1985(2) claim must fail.

By granting summary judgment to Respondents, the Richmond County Superior Court and, in affirming that decision, the Georgia Court of Appeals, necessarily determined that Respondents neither engaged in a conspiracy, nor intimidated or retaliated against Petitioner. Petitioner alleged these exact elements -- conspiracy to intimidate and retaliate against Petitioner through the termination of his at will employment -- as a predicate act for his claim under the Georgia RICO statute. State Complaint ¶ 19 (attached at Appendix G). Indeed, Petitioner alleged in the State Complaint that the decision to terminate his employment was made:

> for the purpose of *retaliating* against [Petitioner] for his cooperation with federal agents and in order to *intimidate* [Petitioner] and others from cooperating with federal agents or testifying in any criminal matters against them.

Id. (emphasis added). Additionally, Petitioner alleged that Respondents were part of a conspiracy to participate in racketeering activities. *Id.* ¶¶ 24, 25.

Moreover, the State Complaint alleged that the retaliation and intimidation were "racketeering activities" because Respondents' actions violated 18 U.S.C. § 1503 (obstruction of justice), a listed predicate act under the Georgia RICO statute. State Complaint ¶21. Importantly, the prohibitions of 18 U.S.C. § 1503 are very similar to the prohibitions of 42 U.S.C. § 1985(2). Under 18 U.S.C. § 1503, it is unlawful to "corrupt or by threats or force, or by any threatening letter or communication, influence[ ], obstruct[ ], or impede[ ], . . . the due administration of justice." Similarly, 42 U.S.C. § 1985(2) prohibits:

> conspir[ing] to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein.

The factual issues that were necessary to decide the Georgia RICO claim in the state case are the same factual issues that must ultimately be decided in this case. Did Respondents conspire? Did Respondents intimidate or retaliate against Petitioner for Petitioner's cooperation with the federal investigation? The same allegations form the basis for both Petitioner's Georgia RICO claim and his 42 U.S.C. § 1985(2) claim, i.e., the alleged conspiracy by Respondents to terminate Petitioner's at will employment. The Richmond County Superior Court by granting, and the Georgia Court of Appeals by affirming, summary judgment for the Respondents on Petitioner's Georgia RICO claim, necessarily decided that no conspiracy existed. Moreover, the courts necessarily found that Respondents did not intimidate or retaliate against Petitioner. Both of these issues were necessary to

Petitioner's Georgia RICO claim, yet the Georgia Court of Appeals agreed with the Richmond County Superior Court that the undisputed facts could not establish Petitioner's Georgia RICO claim. Under Georgia's collateral estoppel doctrine, once the Georgia courts found there was not a conspiracy, or any showing of intimidation or retaliation, no other court may re-litigate these issues.

C. This Court Should Dismiss the Writ of Certiorari Rather Than Issue an Advisory Opinion.

Even assuming success before this Court, on remand Petitioner must prove conspiracy, intimidation, and retaliation in order to succeed on his claim under 42 U.S.C. § 1985(2). Yet, the holding of the Georgia courts collaterally estops Petitioner from re-litigating those issues. Therefore, this Court should dismiss the Writ of Certiorari as improvidently granted. Otherwise, this Court risks issuing an advisory opinion concerning a statute's breadth in a case in which the underlying merits already have been determined adverse to Petitioner.

This Court has dismissed cases after granting a writ of certiorari as a result of changed circumstances. *See, e.g.*, *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498, 91 S. Ct. 1650, 1650 (1971) (events occurring after the grant of certiorari "have rendered this case wholly inappropriate for our review"); *see also* 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4015, at 260 ("It is readily accepted that certiorari may be dismissed, even after it has been granted,

on the ground that the record does not present issues suitable for present determination.").

This case presents just such circumstances. When the Writ of Certiorari was granted in this case, the question before the Court regarding the scope of 42 U.S.C. § 1985(2) was a determinative issue in the federal case. However, once the Georgia Court of Appeals upheld the Richmond County Superior Court's judgment for Respondents, the issue before this Court in essence became moot. Regardless of the outcome of this Court's decision, Petitioner's 42 U.S.C. § 1985(2) will fail. Under 28 U.S.C. § 1738, Petitioner will be collaterally estopped from re-litigating these issues if this Court were to reverse the decisions of the district court and court of appeals and remand the case. Therefore, this Court should dismiss the Writ of Certiorari because of considerations "which were not manifest or fully apprehended at the time certiorari was granted." *Ferguson v. Moore-McCormack Lines, Inc.* 352 U.S. 521, 559, 77 S. Ct. 457, 458 (1957) (Harlan, J., concurring in part and dissenting in part).

CONCLUSION

For the above reasons, this Court should dismiss the Writ of Certiorari as improvidently granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 20 1998
OFFICE OF THE CLERK

(1)

No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX FOR MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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July 16, 1998

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APPENDIX

Order of the Untited States District Court
for the Southern District of Georgia dated
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Order of the Superior Court of Richmond
County State of Georgia dated June 10, 1997 .... B-1

Opinion of the United States Court of Appeals
for the Eleventh Circuit dated December 5, 1997 . C-1

Opinion of the Court of Appeals of Georgia
dated June 16, 1998 ..... D-1

Order of the Court of Appeals of Georgia
Denying Motion for Reconsideration dated
July 7, 1998 ..... E-1

Amended Complaint filed by Plaintiff
Michael A. Haddle in the United States
District Court for the Southern District of
Georgia dated March 27, 1996 ..... F-1

Complaint filed by Plaintiff Michael A. Haddle
in the Superior Court of Richmond County
State of Georgia dated July 9, 1996 ..... G-1

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

MICHAEL A. HADDLE,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., a Georgia Corporation, CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,	:	
Defendants.	:	NO. CV196-29

ORDER

Plaintiff, Michael A. Haddle, has brought the current litigation seeking damages under Section 1985(2) of Title 42 of the United States Code, and state law. Presently before the Court are four motions to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. These motions have been filed by

Defendants, Jeanette G. Garrison (DKT. #21), Healthmaster, Inc. (DKT. #23), Christopher Garrison (DKT. #26), and G. Peter Molloy, Jr. (DKT. #44). For the reasons stated below, Defendants' motions will be **GRANTED.**

FACTS

Haddle is a former employee of Healthmaster Home Health Care, Inc. He claims that he was improperly discharged from his employment by Defendants in an attempt to deter his participation as a witness in a Federal criminal trial. At the times relevant to this litigation, Haddle concedes that he was an at-will employee.

DISCUSSION

I. Rule 12(b)(6)

Rule 12(b)(6) permits a defendant to move to dismiss a complaint on the grounds that the plaintiff has failed to state a claim upon which relief can be granted. A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of a 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true. Jackson v. Okaloossa County Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). A court should not dismiss a complaint for failure to state a claim unless it is clear that the

plaintiff can prove "no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).; See also Blackston v. State of Alabama, 30 F.3d 117, 119 (11th Cir. 1994) (citing, Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)).

II. 42 U.S.C. § 1985(2)

Section 1985(2) grants a private cause of action for injuries when:

> [T]wo or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . .

In the case at bar, Haddle asserts that he can maintain an action under Section 1985(2) despite the fact that he was defined as an at-will employee during the term of his employment. This is directly contrary to binding precedent of the Eleventh Circuit. Case law states:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because [Plaintiff] was

> an at-will employee . . . he has no constitutionally protected interest in continued employment. Therefore, [Plaintiff's] discharge did not constitute an actual injury under this statute.

Morast v. Lance, 807 F.2d 926, 930 (11th Cir. 1987). Given the clear language of Morast, the Court is required to **DISMISS** Haddle's claim under Section 1985(2).

III. State Law Claims

Haddle has also alleged numerous state law claims against Defendants. Since the federal issue pending in this litigation has been disposed, the Court believes that the remaining state law issues should be left to the courts of Georgia. The Court declines to retain discretionary supplemental jurisdiction over the remainder of this case. See 28 U.S.C. § 1367 (c)(3).

CONCLUSION

The Court has determined that, under Rule 12(b)(6) Haddle has failed to state a federal claim upon which relief can be granted. His claim under Section 1985(2) is **DISMISSED** with respect to the above named

Defendants.[1] Additionally, all state law claims are **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED, this 25 day of June, 1996.

/S/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[1] Haddle's claims against Dennis Kelly and the unnamed John Does cannot be dismissed, as a motion requesting such action has not been filed.

APPENDIX B

SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

MICHAEL A. HADDLE, Plaintiff, v. JEANETTE G. GARRISON, G. PETER MOLLOY, JR., HEALTHMASTER, INC., and CHRISTOPHER GARRISON, individually and as Trustee of certain trusts, Defendants.	Civil Action File No. 96-RCCV-572

ORDER

The following motions are before the Court: (1) Defendants Jeanette G. Garrison and Healthmaster, Inc.'s Motion for an Entitled Partial Summary Judgment; (2) Defendant G. Peter Molloy's Motion for Summary Judgment; and (3) Defendants Jeanette G. Garrison and Christopher Garrison's Motion for

Summary Judgment. After careful review, the Court hereby: (1) GRANTS Defendants Jeanette G. Garrison and Healthmaster, Inc.'s Motion for an Entitled Partial Summary Judgment; (2) GRANTS Defendant G. Peter Molloy's Motion for Summary Judgment; and (3) GRANTS Defendants Jeanette G. Garrison and Christopher Garrison's Motion for Summary Judgment.

Since the first two motions involve similar facts and legal issues, they will be addressed together. The Garrisons' motion has different facts and issues and will be discussed separately.

I. Garrison-HLM, Inc. and Molloy Motions

STATEMENT OF FACTS AND PROCEDURAL HISTORY

These motions involve Counts I (Georgia RICO violations) and II (tortious interference) of Plaintiff's Complaint.

Plaintiff formerly served as Director of Cost Reimbursement at Defendant Healthmaster, a corporation owned by Mrs. Garrison and her husband and controlled by Mrs. Garrison. (Healthmaster eventually changed its name to HLM, Inc.) At all relevant times, Plaintiff was an at-will employee of Healthmaster.

In 1994, the federal government began to investigate Healthmaster for fraudulent reimbursements it received from Medicare. Mrs. Garrison eventually pleaded guilt y to related charges in July 1995, and the charges against Healthmaster were dropped.

In April of 1995, Healthmaster Home Health Care, Inc. ("HHHC"), a wholly owned subsidiary of HLM, Inc. (f/k/a/ Healthmaster, Inc.) ("HLM"), filed for bankruptcy. All HLM employees were subsequently transferred to HHHC. Also in April 1995, Mrs. Garrison appointed Molloy, then an in-house lawyer for HLM, president of HHHC. Although Mrs. Garrison maintained contacts with HLC and HHHC up until her plea, it appears that Molloy and A. Stephenson Wallace, the bankruptcy trustee appointed to this case, controlled the daily operations of the corporations after April 1995.

On June 21, 1995, Molloy, with the approval of the bankruptcy trustee, terminated Plaintiff. Molloy fired Plaintiff because he "stop[ped] doing his job" and "he had been very disloyal to the company." (Molloy Depo. pp 8-9.) Molloy claims that he did not consult with or otherwise receive instructions from Mrs. Garrison before terminating Plaintiff. (Id. at 203-04.) Mrs. Garrison claims that she did not learn of Plaintiff's termination until after it happened. (J. Garrison Depo. pp. 75-76.)

On March 18, 1997, Mrs. Garrison and HLM, Inc. filed their Motion for Partial Summary Judgment on Counts I and II of Plaintiff's Second Amended Complaint. Molloy filed his Motion for Summary Judgment on March 31, 1997, and it likewise pertains to only Counts I and II.

CONCLUSIONS OF LAW

A. *Tortious Interference*

O.C.G.A. § 34-7-1 states in pertinent part that "an indefinite hiring may be terminated at will by either party." An employee may bring a claim for tortious interference with an employment contract if he shows that "a party with no authority to discharge the employee, being activated by an unlawful scheme or purpose to injure and damage him, maliciously and unlawfully persuades the employer to breach the contract with the employee." Moore v. Barge, 210 Ga. App. 552, 553, 436 S.E.2d 746 (1993), *quoting* Campbell v. Carroll, 121 Ga. App. 497, 499, 174 S.E.2d 375 (1978). However, "a person whose employment contract is at will has no cause of action for wrongful termination or tortious interference with the contract against one who has an absolute right to terminate that employee." Moore; see also Georgia Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442 (1978); Jellico v. Effingham County, 221 Ga. App. 252, 253, 471 S.E.2d 36 (1996); Ikemiya v. Shibamoto America, 213 Ga. App. 271, 273 (1), 444 S.E.2d 351 (1994); Mr. B's Oil Co. v. Register, 181 Ga. App. 166,

167, 351 S.E.2d 533 (1986); Troy v. Interstate Financial, 171 Ga. App. 763, 766 (1), 320 S.E.2d 872 (1984).

Accordingly, the issue is whether Molloy had the authority to fire Plaintiff. At all relevant times Plaintiff was an at-will employee of HHHC. Molloy was president of HHHC when he fired Plaintiff. Along with Steve Wallace, the bankruptcy trustee for Healthmaster, Molloy ran the daily operations of HHHC. Molloy conferred with and received approval from Wallace before firing Plaintiff. (Wallace Depo. pp. 10 and 67) Therefore, Molloy had the authority to fire Plaintiff because he was the chief executive officer of HHHC and because he obtained the necessary authorization from the bankruptcy trustee. "Since the record shows that [Molloy], as president of [HHHC], had absolute authority to terminate [Haddle], he cannot be held liable." Moore, 210 Ga. App. at 553.

Plaintiff's allegations of a conspiracy of retaliatory discharge are unavailing. "Where the plaintiff's employment is terminable at will, the employer, with or without cause and regardless of the motives involved, can discharge the employee without incurring liability. Lengthy allegations regarding the motives or reasons for the firing are legally irrelevant." Mr. B's Oil Co., 181 Ga. App. at 167. (citations omitted) See also Miles v. Bibb Company, 177 Ga. App. 364, 365, 339 S.E.2d 316 (1985).

"If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a home of cards. All of the other disputes of fact are rendered immaterial." Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). Plaintiff cannot prove an essential element of his tortious interference claim, that is, he cannot show that Molloy lacked the authority to fire him. If the claim fails against Molloy, it also fails against Mrs. Garrison and HLM, since their liability for this claim depends on whether Molloy was authorized to fire Plaintiff. Molloy was, and the tortious interference claims against the Defendants fails.

B. *RICO*

O.C.G.A. § 16-14-4, the Georgia RICO Act, prohibits (a) the acquisition of anything of value "through a pattern of racketeering activity or proceeds derived therefrom"; (b) any participation in an enterprise "through a pattern of racketeering activity"; and (c) any conspiracy to violate (a) and (b). O.C.G.A. § 16-14-6(c) creates a civil remedy for a plaintiff who is "injured by reason of any violation of Code Section 16-14-4. . . . "

To maintain a cause of action under Georgia RICO, a plaintiff must establish a pattern of racketeering activity. O.C.G.A. § 16-14-3(8) defines a "pattern of racketeering activity" as "engaging in *at least two* incidents of racketeering activity that have the same or similar intents, results, accomplices,

victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." (emphasis added) "Racketeering activity" means "to commit, to attempt to commit, or to solicit, coerce or intimidate another person to commit any crime which is chargeable by indictment" under a list of laws. O.C.G.A. § 16-14-3(9).

Plaintiff cites three "predicate acts" that constitute a pattern of racketeering activity: (1) his employment termination; (2) the placing of Mr. O'Neal (a former employee of Master Health Plan, a subsidiary of Healthmaster) on administrative leave; and (3) the termination of Mr. O'Neal's employment. As was stated above, Plaintiff's employment was lawfully terminated; therefore, he cannot use his termination to establish racketeering activity.

As for the predicate acts relating to Mr. O'Neal, Judge Alaimo has ruled previously that these acts were lawful. In granting Mrs. Garrison's, HLM's and Molloy's motions for summary judgment on Mr. O'Neal's Georgia RICO claim, the court held:

> [t]he difficulty with O'Neal's claim is that it is based upon two predicate acts that, under Georgia law, are lawful. Garrison had authority to place O'Neal on administrative

> leave and Peloquin had authority to fire O'Neal. Both actions were lawful under Georgia law because O'Neal was merely an at-will employee who could be fired for virtually any reason at any time.

O'Neal v. Garrison, No. CV-196-28 (S.D. Ga. Feb. 28, 1997) at pp. 8-9.

Although the O'Neal decision is not binding on this Court, it should be extremely persuasive. Judge Alaimo relied on Morast v. Lance, 807 F.2d 926 (11th Cir. 1987), which held "that an at-will employee who is terminated cannot use the federal RICO statute to recover for that termination." O'Neal, at p. 7. In Morast the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's Georgia RICO claim, noting that "Georgia's RICO statutes are essentially identical to the federal RICO statutes." Morast, 807 F.2d at 933.[2]

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[2] In his Brief in Opposition to Motion for Partial Summary Judgment of Defendant Jeanette G. Garrison and HLM, Inc. (formerly Healthmaster), Plaintiff states that "[i]n all honesty, . . . if the Morast decision is correct on this point, then his case must fail." He then argues that Morast is not binding on this Court and that it was incorrectly decided.

In both Morast and O'Neal, the court refused to allow the plaintiff to use the RICO statutes to recover for the loss of his job. Realizing the similarities between Georgia and federal RICO law, this Court likewise denies Plaintiff any relief under Georgia RICO. He cannot establish a pattern of racketeering activity since the Defendants lawfully terminated him and Mr. O'Neal. Although Plaintiff notes that Judge Alaimo found that O'Neal did have a claim for illegal retaliation under federal law, this is only one illegal act and therefore is not a pattern of racketeering activity. Accordingly, Plaintiff's RICO claims fail.

DECISION

For the foregoing reasons, the Court GRANTS Mrs. Garrison and HLM's Motion for Partial Summary Judgment and Molloy's Motion for Summary Judgment. Defendants lawfully terminated Plaintiff, an at-will employee, and therefore are entitled to judgment as a matter of law on Plaintiff's tortious interference and RICO claims.

II. Jeanette and Christopher Garrison's Motion

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This motion involves Count III (fraudulent conveyance) of Plaintiff's Complaint.

In 1993, the accounting firm of Ernst & Young suggested the use of grantor retained annuity trusts, or GRATS, as an estate planning device for Jeanette Garrison and her husband, Dr. Joseph Garrison. In a GRAT transaction, a person transfers property to a trust and retains the right to receive a fixed annuity payment for a specified number of years. At the end of the trust term, the property remaining in the trust either goes to the named beneficiaries or remains in trust for their benefit. The GRAT seeks to limit the grantor's transfer tax while maximizing the amount of appreciation in trust assets. (Letter from Swinton Griffith to Dennis Kelly of 11/12/93.)

From 1994 to 1995, Healthmaster was under federal and state investigation for Medicare fraud. On February 1, 1995, Jeanette Garrison transferred her stock in HLM, Inc. and Health Care Services (HCS) to two GRATS. Phillip A. Bradley, her attorney, was designated the trustee for each GRAT. Mrs. Garrison owned 50% of the stock in both HLM and HCS, and her husband owned the other 50% of stock in each company. One of the GRATS received Mrs. Garrison's HLM stock and the other GRAT received her HCS stock. On the same date, Dr. Garrison transferred his HLM and HCS stock to two GRATS.

The beneficiaries of the GRATS are Christopher Garrison and Janece Garrison, the children of Dr. and Mrs. Garrison. Dr. and Mrs. Garrison have already received annuity income from the GRATS. Christopher and Janece will receive the property

remaining in the GRATS after all required payments are made to Dr. and Mrs. Garrison.

Mrs. Garrison, HLM and Master Health Plan were indicted in the U.S. District Court for the Southern District of Georgia on March 9, 1995. On June 21, 1995, Plaintiff was terminated by HHHC. Plaintiff filed the present Complaint on July 9, 1996. Mrs. Garrison and Christopher Garrison filed their Motion for Summary Judgment on March 20, 1997.

DISCUSSION

A. *Fraudulent Conveyances*

Plaintiff claims that the GRAT transactions described above constitute fraudulent conveyances under O.C.G.A. § 18-2-22. Defendants argue that they are entitled to summary judgment on this claim since Plaintiff was not one of their creditors at the time of the GRAT transactions.

O.C.G.A. § 18-2-22 states in full:

> The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:
>
> (1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property or choses in action of

any description to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;

(2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with the intention to delay or defraud creditors, where such intention is known to the taking parties; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid; and

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

Plaintiff claims that the GRAT transactions violated all three subsections. However, under the wording of the statute, the Plaintiff must show initially that he was a creditor of the Defendants. As is discussed below, Plaintiff cannot satisfy this threshold element.

1. Plaintiff as Creditor

The introductory language to O.C.G.A. § 18-2-22 states in part that certain "acts by debtors shall be fraudulent in law against creditors." Thus, the statute does not apply unless a debtor-creditor relationship exists.

There is no such relationship here. It does not appear that the Defendants owe the Plaintiff any money. The Plaintiff is not a claimholder against the Defendants by way of a tort action, since his tortious interference and RICO claims are meritless. The Plaintiff does not offer any other grounds establishing the required debtor-creditor relationship.

Under certain circumstances a plaintiff with an unliquidated claim may pursue a fraudulent conveyance claim. In McVeigh v. Harrison, 185 Ga. 121, 194 S.E. 208 (1937) the plaintiff sued the defendants for the wrongful death of her child which occurred on March 29, 1936. Six days after the death of the child, one of the defendants transferred realty and peronalty to various family members. The plaintiff included in her complaint a fraudulent conveyance claim based on these transfers. The court held that, although technically not a "creditor," the plaintiff could sue the defendant and his grantees for fraudulent conveyance because the defendant transferred property *after the commission of the tort*. Id. at 130-31. (emphasis added) McVeigh is distinguishable from this case since the GRAT transactions occurred before the commission of the

alleged tort, i.e. the termination of Plaintiff. See also Downs v. Powell, 215 Ga. 62, 108 S.E.2d 715 (1959).

Plaintiff correctly states that "[c]onveyances may be fraudulent as to subsequent creditors, as well as to existing creditors, if made with intent to defraud." Jones v. J.S.H. Co., 199 Ga. 755, 769, 35 S.E.2d 288 (1945); State Banking Co. v. Miller, 185 Ga. 653, 656 (7), 196 S.E. 47 (1938). This argument is inapposite here, again because it relies on a debtor-creditor relationship. The Plaintiff cannot prove this relationship under any facts presented to the Court.

Accordingly, the Plaintiff's fraudulent conveyance claim fails because he cannot show a debtor-credit relationship, an "essential element" of his claim. See Lau's Corp., *supra.*

DECISION

For the foregoing reasons, the Court GRANTS Mrs. Garrison and Christopher Garrison's Motion for Summary Judgment. The Defendants were not debtors of the Plaintiff at the time of the GRAT transactions, and therefore are entitled to judgment as a matter of law on the fraudulent conveyance claim.

It is so ORDERED this 10th day of June, 1997.

/S/ Bernard J. Mulherin, Sr.
J.S.C.A.J.C.

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-8856

D.C. Docket No. CV 196-29 (AAA)

MICHAEL A. HADDLE,

Plaintiff-Appellant,

versus

JEANETTE G. GARRISON, DENNIS KELLY,
G. PETER MOLLOY, JR., HEALTHMASTER, INC.,
CHRISTOPHER GARRISON, individually and as
Trustee of certain trusts, et al.,

Defendants-Appellees.

No. 96-9072

D.C. Docket No. 96-00029-CV-1 (AAA)

MICHAEL A. HADDLE,

Plaintiff-Appellant,

versus

JEANETTE G. GARRISON, DENNIS KELLY,
G. PETER MOLLOY, JR., HEALTHMASTER, INC.,
CHRISTOPHER GARRISON, individually and as
Trustee of certain trusts,
JOHN DOES, 1 Through N, individually and
as Trustees of certain trusts,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Georgia

(December 5, 1997)

Before COX and BARKETT, Circuit Judges, and HUNT,*** District Judge.

PER CURIAM:

Michael A. Haddle appeals following the district court's dismissal of his 42 U.S.C. § 1985(2) claim for failure to state a claim. We conclude that Haddle's arguments on appeal are foreclosed by this court's decision in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987). The judgment of the district court is therefore affirmed.

AFFIRMED.[3]

---

* Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

[3] No member of this panel nor other judge in regular active service on the court has requested that the court be polled on Haddle's Suggestion of Hearing En Banc. See Fed. R . App. P. 35; 11th Cir. R. 35-5. Therefore, Haddle's Suggestion of Hearing En Banc is denied.

APPENDIX D

SECOND DIVISION

JOHNSON, P.J., SMITH, J.,

SENIOR APPELLATE JUDGE HAROLD R. BANKE

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

June 16, 1998

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

SMITH, Judge.

In this case, the following circumstances exist and are dispositive of the appeal:

(1) The evidence supports the judgment;

(2) No reversible error of law appears and an opinion would have no precedential value;

(3) The judgment of the court below adequately explains the decision; and

(4) The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.

The judgment of the court below therefore is affirmed in accordance with Court of Appeals Rule 36.

Judgment affirmed. Johnson, P.J., and Senior Appellate Judge Harold R. Banke concur.

APPENDIX E

Court of Appeals
of the State of Georgia

ATLANTA, July 07, 1998

The Court of Appeals hereby passes the following order:

Case No. A98A0020

MICHAEL A. HADDLE V. JEANETTE G. GARRISON ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, July 07, 1998

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/S/ Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. HADDLE,	)	CASE NO. CV 196-29
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JEANETTE G. GARRISON,	)	
DENNIS KELLY, G.	)	
PETER MOLLOY, JR.,	)	
HEALTHMASTER, INC.,	)	
CHRISTOPHER GARRISON,	)	
individually and as Trustee	)	
of certain trusts, and JOHN	)	
DOES 1 THROUGH N,	)	
individually and as Trustees	)	
of certain trusts,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT FOR DAMAGES PURSUANT TO 42 U.S.C. §1985(2) (THE CIVIL RIGHTS ACT OF 1871), O.C.G.A. §16-14-6 (THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT), AND GEORGIA LAW OF TORTIOUS INTERFERENCE AND FRAUDULENT CONVEYANCE

NOW COMES Plaintiff MICHAEL A. HADDLE and for this his complaint against Defendants JEANETTE G. GARRISON ("Garrison"), DENNIS KELLY ("Kelly"), PETER MOLLOY ("Molloy"), HEALTHMASTER, INC. ("Healthmaster"), CHRISTOPHER GARRISON, as Trustee of certain trusts ("Garrison Trustee"), and JOHN DOES 1 THROUGH N, as Trustees of certain trusts ("John Doe Trustees"), shows as follows:

INTRODUCTORY STATEMENT

1. Plaintiff is a citizen and resident of the State of Georgia.

2. Defendant Garrison is a resident of the State of South Carolina.

3. Defendants Molloy, Kelly and Garrison Trustee are residents of the Southern District of Georgia. Defendant John Doe Trustees are named because Plaintiff does not know whether the trusts described in Count IV hereinbelow have trustees other than Defendant Garrison Trustee.

4. Defendant Healthmaster is a corporation organized and existing under the laws of the State of Georgia with its principal place of business within the Southern District of Georgia.

5. Jurisdiction is proper in this Court over Count I of this Complaint (the Civil Rights Act of 1871) by virtue of 28 U.S.C. §1331. Jurisdiction over Count II (Georgia RICO), Count III (Tortious Interference) and Count IV (Fraudulent Conveyance) is proper in this Court because these Counts are pendent to Count I.

6. Venue is proper in this Court in that most Defendants reside within the Southern District of Georgia and in that the actions of all Defendants as alleged below occurred within the Southern District of Georgia.

GENERAL FACTUAL ALLEGATIONS

7. From September 22, 1986 until approximately April 13, 1995, Plaintiff was employed by Defendant Healthmaster.

8. From approximately April 13, 1995 until his discharge as alleged below, Plaintiff was employed by Healthmaster Home Health Care, Inc., a Georgia corporation whose stock is owned entirely by Defendant Healthmaster.

9. Defendant Garrison has at all relevant times owned 50% of the stock of Healthmaster and controlled Healthmaster until April or May, 1995, when a trustee was appointed for Healthmaster, then a debtor in possession under Chapter 11 of the federal Bankruptcy Code, by the United States Bankruptcy Court for the Southern District of Georgia.

10. The individual Defendants herein (except for Defendants Garrison Trustee and John Doe Trustees) have all served in various capacities as corporate officers and directors of Defendant Healthmaster and of Healthmaster Home Health Care, Inc.

11. Defendant Molloy has at all relevant times been employed by Defendant Healthmaster or Healthmaster Home Health Care, Inc.

12. On March 8, 1995, a grand jury convened in the United States District Court for the Southern District of Georgia, Augusta Division, filed an indictment against Defendants Garrison, Kelly, Healthmaster and others charging a total of 133 counts of fraud against various defendants, which indictment is enumerated as number CR-195-11 in this Court.

13. Although not indicted, Defendant Molloy was, on information and belief, a target of the ongoing criminal investigation.

14. Plaintiff cooperated with the investigation by federal agents which preceded this indictment and testified pursuant to subpoena before said grand jury and appeared pursuant to subpoena to testify before said grand jury, although his testimony was not actually taken due to the press of time.

15. As a result of their indictment, Defendants Garrison and Kelly were banned from any participation

in the affairs of Healthmaster Home Health Care, Inc., by order of said Bankruptcy Court.

16. On June 21, 1995, after Defendants (other than Defendants Garrison Trustee and John Doe Trustees) had become aware that Plaintiff would appear as a witness at the criminal trial of Indictment No. CR 195-11, Defendant Molloy, who was then President of Defendant Healthmaster, having been retained in said position by the trustee, but acting at the direction of Defendants Garrison and Kelly and pursuant to a prior understanding and agreement between these three persons, terminated Plaintiff from his employment at Healthmaster Home Health Care, Inc.

COUNT 1 - CONSPIRACY IN VIOLATION OF 42 U.S.C. §1985(2) (THE CIVIL RIGHTS ACT OF 1871)

17. The allegations contained in paragraphs numbered "1" through "16" are incorporated herein by reference.

18. The decision to terminate Plaintiff was made by Defendants (other than Defendants Garrison Trustee and John Doe Trustees) and others, not in furtherance of the business interests of Defendant Healthmaster, but instead for the purpose of retaliating against Plaintiff for his cooperation with federal agents and his testimony under subpoena to the federal grand jury, and in order to intimidate Plaintiff and others from

cooperating with federal agents or testifying in any criminal matters against them including said indictment.

19. Defendants (other than Defendants Garrison Trustee and John Doe Trustees) participated in and carried out the decision to terminate Plaintiff, not in furtherance of the business interests of Defendant Healthmaster, but rather to protect themselves as criminal defendants or potential criminal defendants.

20. By means of the above described actions, and their agreement and plan to do the same, Defendants (other than Defendants Garrison Trustee and John Doe Trustees) have violated 42 U.S.C. §1985(2), in that they have conspired within the State of Georgia to deter, by force, intimidation or threat, a party or witness in the United States District Court for the Southern District of Georgia, from attending such court, or from testifying in any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of the grand jurors of such court.

21. Plaintiff has been injured in his person and property by the acts of Defendants (other than Defendants Garrison Trustee and John Doe Trustees) in violation of 42 U.S.C. §1985(2), and Plaintiff is entitled to recover his damages occasioned by such injury and deprivation against Defendants jointly and severally.

22. Because said Defendants' acts were willful, intentional and malicious, Plaintiff is entitled to recover punitive damages against Defendants jointly and severally.

23. Pursuant to 42 U.S.C. §1988, Plaintiff is entitled to recover his expenses of litigation including a reasonable attorney's fee from said Defendants jointly and severally.

COUNT II - VIOLATION OF THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT

24. The allegations contained in paragraphs numbered "1" through "23" are incorporated herein by reference.

25. The actions of Defendants alleged above in paragraphs numbered 14, 16 and 17 constitute racketeering activity within the meaning of O.C.G.A. §16-14-3 (9) (A) and (B) , in that they constitute a violation of 18 U.S.C. §1503 and also a felony punishable by imprisonment for more than one year under federal and Georgia common law of obstruction of justice.

26. After July 1, 1980, and within four years of Plaintiff's termination as alleged above, Defendants (other than Defendants Garrison Trustee and John Doe Trustees) engaged in at least one other incident of racketeering activity that had the same or similar intent,

result, accomplices or methods of commission and otherwise was interrelated to the Plaintiff's termination, by distinguishing characteristics, none of said incidents being isolated, such other incident being the termination of John P. O'Neal from his employment at Master Health Plan, Inc., a Georgia corporation ("Master Health"), in retaliation for his testimony before the same federal grand jury for which Plaintiff testified as alleged above.

27. The above incidents of racketeering activity constitute a pattern of racketeering activity, the purpose and effect of which was to acquire or maintain, directly or indirectly, an interest in or control of certain enterprises, to wit, Defendant Healthmaster and Master Health, to conduct or participate in said enterprises, and to acquire money.

28. Defendants (other than Garrison Trustee and John Doe Trustees) conspired and endeavored to conduct or participate in, directly or indirectly, the said enterprises through a pattern of racketeering activity, and to acquire money.

29. Said Defendants conspired and endeavored to acquire or maintain, directly or indirectly, an interest in said enterprises and to conduct or participate in, directly or indirectly, said enterprises through a pattern of racketeering activity, and to acquire money.

30. In committing the acts to which reference is made in this Count, said Defendants have acted willfully, maliciously, wantonly, oppressively,

intentionally, knowingly, fraudulently, in bad faith, and with reckless disregard of the consequences, and with such entire want of care as raises the presumption of conscious indifference to consequences, such as to entitle Plaintiff to punitive damages under Georgia law, including O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to limitation provided by O.C.G.A. §51-12-5.1(g), because each Defendant acted with the specific intent to cause harm to Plaintiff.

31. Plaintiff is a person injured by reason of Defendants' violation of O.C.G.A. §16-14-4 and is entitled to three times his actual damages sustained, as well as punitive damages and attorneys' fees.

COURT III - TORTIOUS INTERFERENCE

32. The allegations contained in paragraphs numbered "1" through "31"are incorporated herein by reference.

33. Although they had no authority to act for Healthmaster Home Health Care, Inc. , at the time of Plaintiff's termination, Defendants Garrison and Kelly, through their agreement with and direction to Defendant Molloy, and acting both for themselves and for Defendant Healthmaster, tortiously interfered with Plaintiff's employment relationship with Healthmaster Home Health Care, Inc. by causing Plaintiff's termination.

34. Defendant Molloy, in terminating Plaintiff from his employment at Healthmaster Home Health Care, Inc., tortiously interfered with Plaintiff's relationship with Healthmaster Home Health Care, Inc. because Defendant Molloy acted not for the benefit of Healthmaster Home Health Care, Inc. but in order to protect himself and Defendants Garrison, Kelly and Healthmaster as alleged above.

35. Plaintiff had a legitimate continuing expectation of employment with Healthmaster Home Health Care, Inc. and his termination has resulted in actual damages.

36. Because said Defendants acted as alleged in paragraph 30, Plaintiff is entitled to punitive damages.

37. In acting as alleged above, said Defendants have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense, whereby Plaintiff is entitled to recover his expenses of litigation including reasonable attorneys' fees.

COUNT IV - FRAUDULENT CONVEYANCE

38. The allegations contained in paragraphs numbered 1 through 37 are incorporated herein by reference.

39. On information and belief, on a date or dates unknown but believed by Plaintiff to be sometime

during the year 1995 Defendant Garrison either conveyed her stock interest in Defendant Healthmaster, or caused Defendant Healthmaster to convey its stock interest in Healthmaster Home Health Care, Inc., to Defendant Garrison Trustee and/or Defendant John Doe Trustees in trust for the benefit of Defendant Garrison and Defendant Garrison's children. Also, on information and belief, on a date or dates unknown but believed by Plaintiff to be sometime during the year 1995, Defendant Garrison either conveyed or caused to be conveyed her stock interest in an affiliate of Defendant Healthmaster, Health Care Services, Inc., to Defendant Garrison Trustee and/or Defendant John Doe Trustees in trust for the benefit of Defendant Garrison and Defendant Garrison's children. Plaintiff does not know the exact date or dates of such conveyances (the "Conveyances") or the names and trustees (other than Defendant Garrison Trustee), if any, of the grantee trusts.

40. Each of the Conveyances was made at a time when the grantor was insolvent, was made in trust, and reserved a trust or benefit to the grantor.

41. Each of the Conveyances was voluntary and was made not for valuable consideration at a time when Defendant Garrison and/or Defendant Healthmaster was insolvent.

42. Each of the Conveyances was made by Defendant Garrison and Defendant Healthmaster with the intention to delay or to defraud creditors, which intention was known to the taking parties.

43. Each of the Conveyances is null and void as to Plaintiff.

44. Each of the Conveyances was made by the grantor and was received by Defendant Garrison Trustee and/or Defendant John Doe Trustees, with fraudulent intent evidencing willful misconduct, malice, fraud, wantonness, oppression and that entire want of care which would raise the presumption of conscious indifference to consequences, so as to entitle Plaintiff to punitive damages pursuant to O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to limitation provided by O.C.G.A. §51-12-5.1(g), because each of the said Defendants acted with the specific intent to cause harm to creditors such as Plaintiff.

45. In connection with the matters to which reference is made in this Count, Defendants Garrison, Garrison Trustee and John Doe Trustees have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense so as to entitle Plaintiff to an award of attorneys' fees and expenses of litigation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands trial by jury on all counts and judgment (1) as to all Defendants jointly and severally except Defendants Garrison Trustee and John Doe Trustees, for money damages in such amount for actual damages as the evidence may show and treble damages pursuant to Georgia statute as alleged above, (2)

as to Defendants Garrison, Garrison Trustee as trustee and John Doe Trustees as trustees, jointly and severally, a decree establishing that the Conveyances are null and void as to Plaintiff, and (3) as to all Defendants, jointly and severally, judgment for punitive damages and reasonable attorneys' fees and expenses of litigation, together with all costs of Court and such other and further relief as the Court may deem equitable and just.

This 27th day of March, 1996.

C. Thompson Harley
Georgia Bar No. 326800
Fletcher, Harley & Fletcher
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(706) 724-0558

/S/
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APPENDIX G

**IN THE SUPERIOR COURT
OF RICHMOND COUNTY
STATE OF GEORGIA**

MICHAEL A. HADDLE,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION FILE
vs.	)	NO: 96-RCCV-572
	)	
JEANETTE G. GARRISON,	)	
DENNIS KELLY, G.	)	
PETER MOLLOY, JR.,	)	
HEALTHMASTER, INC.,	)	
CHRISTOPHER GARRISON,	)	
individually and as Trustee	)	
of certain trusts, and JANECE	)	
GARRISON, individually and	)	
as Trustee of certain trusts.	)	
	)	
Defendants.	)	

COMPLAINT

NOW COMES Plaintiff MICHAEL A. HADDLE and for this his complaint against Defendants JEANETTE G. GARRISON ("Mrs. Garrison"), DENNIS KELLY ("Kelly"), PETER MOLLOY ("Molloy"), HEALTHMASTER, INC. ("Healthmaster"),

CHRISTOPHER GARRISON, as Trustee of certain trusts, and JANECE GARRISON, as Trustee of certain trusts, shows as follows:

INTRODUCTORY STATEMENT

1. Defendant Mrs. Garrison is a resident of Richmond County, Georgia, temporarily sojourning in federal prison in Texas.

2. Defendant Kelly is a resident of Richmond County, Georgia, temporarily sojourning in federal prison in South Carolina.

3. Defendant G . Peter Molloy is a resident of Richmond County, Georgia.

4. Defendant Healthmaster is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Richmond County, Georgia.

5. Defendant Christopher Garrison, individually and as Trustee, is a resident of Richmond County, Georgia.

6. Defendant Janece Garrison, individually and as Trustee, is a resident of Richmond County, Georgia.

7. Venue is proper in this Court in that all Defendants reside in Richmond County.

GENERAL FACTUAL ALLEGATIONS

8. From September 22, 1986 until approximately April 13, 1995, Plaintiff was employed by Defendant Healthmaster.

9. From approximately April 13, 1995 until his discharge as alleged below, Plaintiff was employed by Healthmaster Home Health Care, Inc., a Georgia corporation whose stock is owned entirely by Defendant Healthmaster.

10. Defendant Mrs. Garrison has at all relevant times owned 50% of the stock of Healthmaster and controlled Healthmaster until April or May 1995, when a trustee was appointed for Healthmaster, then a debtor in possession under Chapter 11 of the federal Bankruptcy Code, by the United States Bankruptcy Court for the Southern District of Georgia.

11. The individual Defendants herein (except for Defendants Christopher Garrison and Janece Garrison, individually and as Trustees) have all served in various capacities as corporate officers and directors of Defendant Healthmaster and of Healthmaster Home Health Care, Inc.

12. Defendant Molloy has at all relevant times been employed by Defendant Healthmaster or Healthmaster Home Health Care, Inc.

13. On March 8, 1995, a grand jury convened in the United States District Court for the Southern District of Georgia, Augusta Division, filed an indictment against Defendants Mrs. Garrison, Kelly, Healthmaster and others charging a total of 133 counts of fraud against various defendants, which indictment is enumerated as number CR-195-11 in this Court.

14. Although not indicted, Defendant Molloy was, on information and belief, a target of the ongoing criminal investigation.

15. Plaintiff cooperated with the investigation by federal agents which preceded this indictment.

16. As a result of their indictment, Defendants Mrs. Garrison and Kelly were banned from any participation in the affairs of Healthmaster Home Health Care, Inc., by order of said Bankruptcy Court.

17. On June 21, 1995, after Defendants (other than Defendants Christopher Garrison and Janece Garrison, individually and as Trustees) had become aware that Plaintiff would appear as a witness at the criminal trial of Indictment No. CR 195-11, Defendant Molloy, who was then President of Healthmaster Home Health Care, Inc., having been retained in said position by the Trustee, but acting at the direction of Defendants

Mrs. Garrison and Kelly (who were themselves acting both for themselves and for Defendant Healthmaster) and pursuant to a prior understanding and agreement between these three persons, terminated Plaintiff from his employment at Healthmaster Home Health Care, Inc.

COUNT I - VIOLATION OF THE GEORGIA RACKETEER INFLUENCE AND CORRUPT ORGANIZATIONS ACT

18. The allegations contained in paragraphs numbered "1" through "17" are incorporated herein by reference.

19. The decision to terminate Plaintiff was made by Defendants (other than Defendants Christopher Garrison and Janece Garrison, individually and as Trustees) and others, not in furtherance of the business interests of Defendant Healthmaster, but instead for the purpose of retaliating against Plaintiff for his cooperation with federal agents and in order to intimidate Plaintiff and others from cooperating with federal agents or testifying in any criminal matters against them including said indictment.

20. Defendants (other than Defendants Christopher Garrison and Janece Garrison, individually and as Trustees) participated in and carried out the decision to terminate Plaintiff, not in furtherance of the business interests of Defendant Healthmaster, but rather to protect themselves as criminal defendants or potential criminal defendants.

21. The actions of Defendants alleged above in paragraphs numbered 17, 19 and 20 constitute racketeering activity within the meaning of O.C.G.A. §16-14-3(9) (A) and (B) , in that they constitute a violation of 18 U.S.C. §1503 and also a felony punishable by imprisonment for more than one year under federal and Georgia common law of obstruction of justice.

22. After July 1, 1980, and within four years of Plaintiff's termination as alleged above, Defendants (other than Defendants Christopher Garrison and Janece Garrison, individually and as Trustees) engaged in at least one other incident of racketeering activity that had the same or similar intent, result, accomplices or methods of commission and otherwise was interrelated to the Plaintiff's termination, by distinguishing characteristics, none of said incidents being isolated, such other incident being the termination of John P. O'Neal from his employment at Master Health Plan, Inc., a Georgia corporation ("Master Health"), in retaliation for his testimony before the same federal grand jury for which Plaintiff testified as alleged above.

23. The above incidents of racketeering activity constitute a pattern of racketeering activity, the purpose and effect of which was to acquire or maintain, directly or indirectly, an interest in or control of certain enterprises, to wit, Defendant Healthmaster and Master Health, to conduct or participate in said enterprises, and to acquire money.

24. Defendants (other than Christopher Garrison and Janece Garrison, individually and as Trustees) conspired and endeavored to conduct or participate in, directly or indirectly, the said enterprises through a pattern of racketeering activity, and to acquire money.

25. Said Defendants conspired and endeavored to acquire or maintain, directly or indirectly, an interest in said enterprises and to conduct or participate in, directly or indirectly, said enterprises through a pattern of racketeering activity, and to acquire money.

26. In committing the acts to which reference is made in this Count, said Defendants have acted willfully, maliciously, wantonly, oppressively, intentionally, knowingly, fraudulently, in bad faith, and with reckless disregard of the consequences, and with such entire want of care as raises the presumption of conscious indifference to consequences, such as to entitle Plaintiff to punitive damages under Georgia law, including O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to limitation provided by O.C.G.A. §51-12-5.1(g), because each Defendant acted with the specific intent to cause harm to Plaintiff.

27. Plaintiff is a person injured by reason of Defendants' violation of O.C.G.A. §16-14-4 and is entitled to three times his actual damages sustained, as well as punitive damages and attorneys' fees.

COUNT II - TORTIOUS INTERFERENCE

28. The allegations contained in paragraphs numbered "1" through "27" are incorporated herein by reference.

29. Although they had no authority to act for Healthmaster Home Health Care, Inc., at the time of Plaintiff's termination, Defendants Mrs. Garrison and Kelly, through their agreement with and direction to Defendant Molloy, and acting both for themselves and for Defendant Healthmaster, tortiously interfered with Plaintiff's employment relationship with Healthmaster Home Health Care, Inc. by causing Plaintiff's termination.

30. Defendant Molloy, in terminating Plaintiff from his employment at Healthmaster Home Health Care, Inc., tortiously interfered with Plaintiff's relationship with Healthmaster Home Health Care, Inc. because Defendant Molloy acted not for the benefit of Healthmaster Home Health Care, Inc. but in order to protect himself and Defendants Mrs. Garrison, Kelly and Healthmaster as alleged above.

31. Plaintiff had a legitimate continuing expectation of employment with Healthmaster Home Health Care, Inc. and his termination has resulted in actual damages.

32. Because said Defendants acted as alleged in paragraph numbered "26", Plaintiff is entitled to punitive damages.

33. In acting as alleged above, said Defendants have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense, whereby Plaintiff is entitled to recover his expenses of litigation including reasonable attorneys' fees.

COUNT III - FRAUDULENT CONVEYANCE

34. The allegations contained in paragraphs numbered 1 through 33 are incorporated herein by reference.

35. On information and belief, on a date or dates unknown but believed by Plaintiff to be February 1, 1995, Defendant Mrs. Garrison either conveyed her stock interest in Defendant Healthmaster, or caused Defendant Healthmaster to convey its stock interest in Healthmaster Home Health Care, Inc., to Philip A. Bradley, in trust for the benefit of Defendant Mrs. Garrison and Defendant Mrs. Garrison's children, who are Defendants Christopher Garrison and Janece Garrison. Also, on information and belief, on a date or dates unknown but believed by Plaintiff to be February 1, 1995, Defendant Mrs. Garrison either conveyed or caused to be conveyed her stock interest in an affiliate of Defendant Healthmaster, Health Care Services, Inc., to Philip A. Bradley, in trust for the benefit of Defendant

Mrs. Garrison and her said children. Subsequently, on or about March 1, 1995, Defendants Christopher Garrison and Janece Garrison became trustees of both said trusts in the place and stead of the said Philip A. Bradley.

36. Each of the Conveyances was made at a time when the grantor was insolvent, was made in trust, and reserved a trust or benefit to the grantor.

37. Each of the Conveyances was voluntary and was made not for valuable consideration and at a time when Defendant Mrs. Garrison and/or Defendant Healthmaster was insolvent.

38. Each of the Conveyances was made by Defendant Mrs. Garrison and Defendant Healthmaster with the intention to delay or to defraud creditors, which intention was known to the taking parties.

39. Each of the Conveyances is null and void as to Plaintiff.

40. Each of the Conveyances was made by the grantor and was received by Philip A. Bradley and Defendant Christopher Garrison and Janece Garrison, individually and as Trustees, with fraudulent intent evidencing willful misconduct, malice, fraud, wantonness, oppression and that entire want of care which would raise the presumption of conscious indifference to consequences, so as to entitle Plaintiff to punitive damages pursuant to O.C.G.A. §51-12-5.1, and further such punitive damages are not subject to

limitation provided by O.C.G.A. §51-12-5.1(g), because each of the said Defendants acted with the specific intent to cause harm to creditors such as Plaintiff.

41. In connection with the matters to which reference is made in this Count, Defendants Mrs. Garrison, Christopher Garrison and Janece Garrison, individually and as Trustees, have acted in bad faith, have been stubbornly litigious and have caused Plaintiff unnecessary trouble and expense so as to entitle Plaintiff to an award of attorneys' fees and expenses of litigation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands trial by jury on all counts and judgment (1) as to all Defendants jointly and severally, for money damages in such amount or actual damages as the evidence may show; (2) as to all Defendants other than Defendants Christopher Garrison and Janece Garrison, individually and as Trustees, treble damages pursuant to Georgia statute as alleged above; (3) as to Defendants Christopher Garrison and Janece Garrison, individually and as Trustees, jointly and severally, a decree establishing that the Conveyances are null and void as to Plaintiff, and (4) as to all Defendants, jointly and severally, judgment for punitive damages and reasonable attorneys' fees and expenses of litigation,

together with all costs of court and such other and further relief as the Court may deem equitable and just.

This 9th day of July, 1996.

/S/

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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON; DENNIS KELLY; G. PETER MOLLOY JR.; HEALTHMASTER, INC.; CHRISTOPHER GARRISON, individually and as Trustee for certain trusts; and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON THE MERITS OF RESPONDENTS JEANETTE G. GARRISON; HLM, INC. (F/K/A HEALTHMASTER, INC.); AND CHRISTOPHER GARRISON

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August 27, 1998

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QUESTION PRESENTED

Whether an employee at will who has not testified in, and was not a party to, a federal proceeding, but whose employment was terminated, has been injured in his "person or property" under 42 U.S.C. § 1985.

LIST OF PARTIES

The caption of the case contains the names of all parties. Respondent HLM, Inc. (f/k/a Healthmaster, Inc.) has no parent company, nonwholly owned subsidiaries, or affiliates to list pursuant to Rule 29.6.

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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON; DENNIS KELLY; G. PETER MOLLOY JR.; HEALTHMASTER, INC.; CHRISTOPHER GARRISON, individually and as Trustee for certain trusts; and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON THE MERITS OF RESPONDENTS JEANETTE G. GARRISON; HLM, INC. (F/K/A HEALTHMASTER, INC.); AND CHRISTOPHER GARRISON

STATEMENT OF THE CASE

Petitioner filed this action in the district court asserting one federal claim under 42 U.S.C. § 1985 and several state law claims against Jeanette Garrison; HLM, Inc. (f/k/a Healthmaster, Inc.) ("HLM"); Christopher Garrison, individually and as Trustee of certain trusts; and others. The district court dismissed Petitioner's Section 1985 claim based upon the binding authority of *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987). The district court also dismissed Petitioner's state law claims after declining to exercise supplemental jurisdiction over the state claims.[1] The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal on the authority of *Morast*.

The district court dismissed Petitioner's Section 1985 claim before any significant discovery took place and the district court did not consider any evidence outside of the pleadings when ruling on the motions to dismiss. Accordingly, the relevant facts for purpose of

[1] Petitioner did not appeal the dismissal of the state law claims. Petitioner refiled his state law claims in a state court action captioned *Haddle v. Garrison, et al.*, Civil Action File No. 96-RCCV-572 (Superior Court of Richmond County, Georgia). The Richmond County Superior Court subsequently granted summary judgment to all defendants on all claims asserted by Petitioner, and the Georgia Court of Appeals affirmed the grant of summary judgment.

Respondents' motions to dismiss are contained in Petitioner's Complaint.[2]

From September 22, 1986, until approximately April 13, 1995, Petitioner was an employee of HLM. (App. 8, ¶ 7.) On March 8, 1995, HLM and others were indicted in the United States District Court for the Southern District of Georgia. (App. 9, ¶ 12.) In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), the wholly-owned operating subsidiary of HLM, filed for protection under Chapter 11 of the bankruptcy code. In connection with the bankruptcy proceeding, most of the employees of HLM, including Petitioner, were transferred to HHHC. (App. 8-9, ¶¶ 8-9.) The bankruptcy court appointed a trustee to oversee the affairs of HHHC. *Id.*

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Petitioner alleges he cooperated with federal agents. While Petitioner at one point alleges he "testified pursuant to subpoena before said grand jury," Petitioner later admits "his testimony was not actually taken due to the press of time." (App. 9, ¶ 14.) Petitioner does not allege he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges he was to be a potential witness in the criminal case against others. (App. 10, ¶16.)

[2] Petitioner amended his Complaint to assert an additional state law claim which is not at issue in this appeal.

On June 21, 1995, the President of HHHC, Respondent G. Peter Molloy, terminated Petitioner's employment with HHHC. *Id.* Petitioner alleged that Mr. Molloy terminated Petitioner's employment as a part of a conspiracy with Respondents Jeanette Garrison, Dennis Kelly and H.M.[3] in retaliation for Petitioner's cooperation with federal agents. (App. 10, ¶ 18.] Petitioner does not allege that he was threatened with force or violence by any of Respondents or that the government ever investigated or charged any of Respondents with obstruction of justice.

Although the holdings of the district court and the court of appeals properly were based on allegations in Petitioner's Complaint, Petitioner improperly includes numerous factual allegations in his brief that are not part of the record and were not considered by the district court or the court of appeals in their rulings on the motions to dismiss. In particular, Petitioner references testimony by Robert Pittard and testimony and rulings in the case of *O'Neal v. Master Health Plan, Inc.*, No. 96-028 (S.D. Ga.) (Petitioner's Brief on the Merits (hereinafter Petitioner's Brief) at 5-6). The Pittard affidavit was not considered by the district court in addressing Respondents' motions to dismiss[4] and the *O'Neal* citations are not part of the

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[3] Christopher Garrison, individually and as trustee for certain trusts, is not named as a defendant in Petitioner's Section 1985 claim. Christopher Garrison was only named as a defendant in a single state law claim.

[4] In Petitioner's attempt to prejudice the Court with extraneous allegations, Petitioner conveniently omits that Mr. Pittard

record. This Court has repeatedly held that parties may only rely on, and the Court may only consider, information that is part of the record. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) ("[T]his Court must affirm or reverse upon the case as it appears on the record . . .."); *In re New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.16 (1970) ("could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case.").[5] Moreover, the testimony and rulings from *O'Neal* are not relevant in this case. The only party against which the plaintiff in *O'Neal* obtained a verdict was Master Health Plan, Inc. ("MHP"), which is *not* a party to this case. Petitioner did not allege that MHP was in any way involved in the termination of Petitioner's employment.

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previously testified under oath contrary to the allegations in Petitioner's Brief and that Mr. Pittard only changed his sworn testimony after he was caught embezzling funds by several of the Respondents.

[5] The cases cited by Petitioner in support of his claim that the Court may take judicial notice of matters in the public record misstates the holdings of the cases. (Petitioner's Brief at 5.) The cases actually hold that a district court may take judicial notice of matters in the public record and if the matters are made part of the record on appeal, then the appellate court may consider such matters. The district court did not take judicial notice of the testimony and rulings in *O'Neal* referred to by Petitioner.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the termination of Petitioner's employment was not a cognizable injury to "person or property" under 42 U.S.C. § 1985. Petitioner was an at will employee and, therefore, had no protected property interest in his employment.

Congress passed Section 1985 following the Civil War along with several other civil rights enactments, including the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1982, and 1983. Section 1983 provides a mechanism for enforcing the prohibition against deprivation of property without due process of law under the Fourteenth Amendment. This Court has repeatedly held that at will employment is *not* a protected property interest under the Due Process Clause. Similarly, courts have held that the protection of "property" under Section 1982 does *not* encompass at will employment. Finally, this Court and Congress have recognized the protection against employment related discrimination under the "make and enforce contracts" clause of Section 1981, but have not found such protection under Section 1981's "persons and property" clause.

Section 1985 does not contain any language related to employment. There is also no reference in the legislative history of the statute to any prohibition against the termination of at will employment. This absence of any reference to employment in the statute and legislative history is consistent with property and employment rights

at the time of passage of Section 1985. Decisions by this Court and other courts both before and after the enactment of Section 1985 demonstrate there was not a recognized property right in at will employment. Moreover, Congress uses explicit terms when limiting an employer's right to terminate at will employment as demonstrated by the numerous anti-discrimination statutes passed by Congress approximately 100 years after the enactment of Section 1985.

Petitioner and *amici curiae* misstate the ramifications of Petitioner not having a cause of action under Section 1982. Employees that actually have their employment terminated in retaliation for testimony in a federal proceeding are protected by alternative civil remedies and criminal statutes prohibiting such actions by employers. The significant incarceration and fines faced by employers that obstruct justice or tamper with witnesses provide more deterrence to employers than a Section 1985 claim.

Petitioner's claim was also properly dismissed on alternative bases. Although Petitioner attempts to selectively rely on decisions from other circuits, the other circuits would have also dismissed Petitioner's claim because he was not a party to a federal proceeding and there is no allegation that Petitioner was inhibited in his testimony. Finally, Petitioner failed to adequately plead force, intimidation or threat to support his retaliation claim.

ARGUMENT

I. INTRODUCTION

This case is an effort to accomplish that which this Court repeatedly has stated it will avoid – converting the reconstruction-era civil rights acts into a general federal tort law. With specific reference to 42 U.S.C. § 1985(3) this Court has held:

> That [Section 1985(3)] was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, that Congress has a right to punish an assault and battery when committed by two or more persons within a State.

Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971). More recently, this Court has stated that a plaintiff's "definitional ploy" should not be allowed to "convert [Section 1985(3)] into [a] 'general federal tort law' . . .." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993). *See also, Paul v. Davis*, 424 U.S. 693, 701 (1976) ("We have noted the 'constitutional shoals' that

confront any attempt to derive from congressional civil rights statutes a body of general federal tort law.").

A proper construction of Section 1985 will avoid that pitfall, and will result in the affirmance of the district court and court of appeals. An expansive interpretation of Section 1985, as urged by Petitioner and *amici curiae*, will in substance result in this Court creating a new body of federal wrongful termination of employment remedies. Respondents urge the Court to exercise judicial restraint and affirm the decisions below.

II. PETITIONER WAS NOT INJURED IN HIS PERSON OR PROPERTY AS A RESULT OF THE TERMINATION OF HIS AT WILL EMPLOYMENT.

The statute under which Petitioner brings his claim, 42 U.S.C. § 1985, has as an essential element that a party be "injured in his person or property." 42 U.S.C. §§ 1985(2) and (3). Although this Court has not yet addressed the limits of injury to "person or property" under Section 1985, it has been held with respect to other civil rights enactments passed contemporaneously with Section 1985 that "property" does not encompass termination of at will employment. Expanding the definition of "property" under Section 1985 to encompass termination of at will employment would not only be inconsistent with the interpretation of the other contemporaneous civil rights enactments, it would be inconsistent with the legislative history of Section 1985

and Congress' understanding of employment rights at the time Section 1985 was enacted.

A. The Reconstruction-Era Civil Rights Enactments That Include References To Property Have Not Been Interpreted To Encompass At Will Employment.

1. History of the Relevant Enactments

Before the Court is the task of interpreting language in provisions of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act) which are now codified in Sections 1985(2) and (3). Although this Court has interpreted other facets of these provisions, it has not addressed the question of what constitutes legally cognizable damages. *See, e.g., Kush v. Rutledge*, 460 U.S. 719, 724 n.5 (1983) ("Our limited grant of certiorari does not encompass the question whether the alleged conspiracy to interfere with witnesses gave rise to any recoverable damages.").

The question presented, although phrased in different iterations by Petitioner and *amici curiae*, is whether the termination of an individual's employment at will is injury to "person or property" within the meaning of the Civil Rights Act of 1871. Petitioner and *amici curiae* have ranged far and wide in their efforts to present to the Court a definition of "property" that encompasses employment at will. Completely absent from their

presentations though, is any discussion of the interpretation of the term "property" as it was used in the reconstruction-era amendments to the United States Constitution and the civil rights legislation enacted pursuant to the amendments (which includes the Civil Rights Act of 1871).

The ratification of the Thirteenth Amendment to the United States Constitution, which abolished the institution of slavery, was officially certified on December 18, 1865. Less than a month later the bill that ultimately became the Civil Rights Act of 1866 was introduced. The legislative history of the Civil Rights Act of 1866 shows the bill was intended to give statutory effect to the Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431-32 (1968).

The joint resolution ultimately adopted as the Fourteenth Amendment to the United States Constitution passed in the same session of Congress. As described by this Court:

> Frequent references to the Civil Rights Act [of 1866] are to be found in the record of the legislative debates on the adoption of the [Fourteenth] Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of

> Congress in supporting adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land.

Hurd v. Hodge, 334 U.S. 24, 32 (1948). The ratification of the Fourteenth Amendment, which allowed the former slaves to become citizens and made it illegal for states to deprive citizens of due process of law or to deny equal protection of the law, was certified in July 1868.

The Fifteenth Amendment to the United States Constitution, which secured to former slaves the right to vote, was proposed in February 1869. The amendment was ratified in February 1870. *United States v. Price*, 383 U.S. 787, 804-05 (1966).

On the heels of the ratification of the Fifteenth Amendment was the enactment of the Civil Rights Act of 1870 (also known as the Enforcement Act). The Civil Rights Act of 1870 prohibited actions by the states and individuals to impede a person's ability to exercise the right of suffrage and conspiracies by individuals to intimidate from, or retaliate against a person for, exercising the rights or privileges provided by the Constitution or federal law. Section 18 of the Civil Rights Act of 1870 also re-enacted, with minor changes, the Civil Rights Act of 1866. *See, Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

The Civil Rights Act of 1871 was among the last of the reconstruction legislation. *Collins v. Hardyman*, 341 U.S. 651, 656 (1951). The 1871 Act was derived in part from the Civil Rights Act of 1866, and was enacted for the purpose of enforcing the Fourteenth Amendment. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972). As originally enacted, the Civil Rights Act of 1871 provided both criminal and civil actions against persons who conspired to violate a person's federally guaranteed rights. The criminal provisions were subsequently declared unconstitutional and were repealed. *United States v. Harris*, 106 U.S. 629 (1883); *see Gill v. Farm Bureau Life Ins. Co. of Missouri*, 906 F.2d 1265, 1268 n.17 (8th Cir. 1990). The civil remedy rarely was invoked. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370-71 (1979).

After various recodifications, the key provisions of the Civil Rights Acts of 1866, 1870, and 1871 now are codified in 42 U.S.C. §§ 1981, 1982, 1983 and 1985. Sections 1981 and 1982 have their genesis in the Civil Rights Act of 1866, re-enacted in the Civil Rights Act of 1870. *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). The parent of Sections 1983 and 1985 is the Civil Rights Act of 1871. *Griffin v. Breckenridge*, 403 U.S. 88, 98-99 (1971). As discussed above, each of these statutes has its constitutional foundation in the reconstruction-era amendments, including the Fourteenth Amendment.

The term "property" is used in the Fourteenth Amendment and in Sections 1981, 1982 and 1985. There

is a substantial body of jurisprudence interpreting what is meant by "property" in the amendment and in the statutes.[6] This body of jurisprudence, interpreting a constitutional amendment and the legislation contemporaneously therewith enacted to enforce the rights established by the Amendment, shows that employment at will is not "property" within their meaning. Further, the language used in this interrelated body of law evidences "property" was not meant to encompass employment at will.

2. The Fourteenth Amendment and 42 U.S.C. § 1983

The Fourteenth Amendment provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law . . .." U.S. Const. amend. XIV, § 1. The remedy for deprivation of property under the Fourteenth Amendment is found in Section 1983. *Paul v. Davis*, 424 U.S. 693, 699-701 (1976). That statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the

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[6] While Section 1983 does not contain the term "property," it has been used on innumerable occasions to seek redress for deprivation of "property" against persons acting under color of state law.

> Constitution and laws, shall be liable to the party injured . . ..

42 U.S.C. § 1983.

The constitutional right to the procedural safeguard of due process is not relevant here. What is relevant is what is meant by the term "property" as used in the Fourteenth Amendment, which is a part of the overall package of reconstruction-era civil rights protections. The term "property" as used in the Fourteenth Amendment does not have a specialized or limited meaning. This Court has declared:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims for entitlement to those benefits.
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> * * *
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *see also, Leis v. Flynt*, 439 U.S. 438, 441 (1979) ("As this Court has observed on numerous occasions, the Constitution does not create property interests.").

This Court squarely addressed whether at will employment constituted "property" within the meaning of the Fourteenth Amendment in *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, a former police officer brought an action alleging that the termination of his employment without a hearing was a violation of due process. *Id.* at 344-45. Consistent with *Roth*, this Court recognized:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

Id. at 344. This Court accepted the lower court's determination that under state law the employee was an employee at will. Having made that determination, this Court held:

> In this case, a holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had *no* property interest.

Id. at 345 n.8.

It is undisputed in this case that Petitioner's employment was as an employee at will. Thus, his employment would not be "property" within the meaning of the Fourteenth Amendment.

3. 42 U.S.C. § 1981

The provision of the reconstruction-era civil rights acts now codified at 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property . . ..

Section 1981 has been held by this Court to provide a remedy against discrimination on account of race in private employment:

> Title 42 U.S.C. § 1981, being the present codification of § 16 of the century-old Civil Rights Act of 1870 . . . on its face relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals – and we now join them – that § 1981 affords a federal remedy

> against discrimination in private employment on the basis of race.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

It is *not* important to this case that this Court recognized a private right of action for race discrimination in employment under Section 1981. It *is* important that the right of action was found by this Court in the clause of Section 1981 relating to the making and enforcing of contracts. The right of action was *not* found in that portion of Section 1981 that provides for "the full and equal benefit of all laws and proceedings for the security of persons and property."

That the foundation for a private right of action under Section 1981 involving employment was found in the "make and enforce contracts" portion of Section 1981 was discussed at length by the majority and those Justices who concurred in part and dissented in part in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, this Court decided that racial harassment in employment was not covered by Section 1981, finding that racial harassment in employment did not involve either the refusal to make a contract or the plaintiff's ability to enforce her employment contract. The racial harassment was found to be "postformation conduct by the employer relating to the terms and conditions of continuing employment." *Id.* at 179.

Were employment rights encompassed by "persons or property," as contended by Petitioner and *amici curiae*, this Court would not have needed to reach the decision it did in *Patterson*. This Court simply could have looked past the "make and enforce contracts" provision of Section 1981 and found that in order to have "the full and equal benefit of all laws and proceedings for the security of persons and property," racial harassment in employment was prohibited by Section 1981.

Congressional intent that employment is covered under the "make and enforce contracts" clause of Section 1981, and not the "persons and property" clause, is evidenced by the 1991 amendment to Section 1981. In direct response to *Patterson*, Congress added a definition of "make and enforce contracts" to include:

> [T]he making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1981(b); s*ee Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304-08 (1994).

Thus, the cases interpreting Section 1981, and Congress' actions in amending Section 1981, evidence that the term "property," as used in the reconstruction-era civil rights acts, does not include at will employment.

4. 42 U.S.C. § 1982

The caption of 42 U.S.C. § 1982 is "Property rights of citizens." The statute provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Respondents recognize that Section 1982 contains the modifiers "real and personal" before the word "property." This Court, though, has stated that:

> To effectuate the remedial purposes of the statute, the Court has broadly construed this language [Section 1982] to protect not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens.

City of Memphis v. Greene, 451 U.S. 100, 120 (1981). In *Greene*, this Court provided several examples of the expansive interpretation given to the term "property." *Id.* at 121-22, including n.35.

Despite this broad construction of the term property in Section 1982, without exception, courts have held that Section 1982 does *not* encompass termination of

employment. *See, e.g., Schirmer v. Eastman Kodak Co.*, No. 86-3533, 1987 WL 9280 *3-4 (E.D. Pa. April 9, 1987), *aff'd*, 869 F.2d 591 (3d Cir. 1989); *Jurado v. Eleven-Fifty Corp.*, 630 F. Supp. 569, 572 (C.D. Cal. 1985), *aff'd*, 813 F.2d 1406 (9th Cir. 1987); *Abel v. Bonfanti*, 625 F. Supp. 263, 269 (S.D.N.Y. 1985); *Tate v. Hills-McCanna Co.*, 42 Fair Empl. Prac. Cas. (BNA) 138, 1932 WL 361 (N.D. Ill. June 16, 1982); *Johnson v. Duval County Teacher's Credit Union*, 507 F. Supp. 307, 310 (M.D. Fla. 1980). The courts found the plaintiffs did not have a "property" interest in their employment. *See, e.g., Schirmer*, 1987 WL 9280 *4 ("employment rights are not 'property'"); *Abel*, 625 F. Supp. at 269 (property interest in continued employment has not been recognized as protected by Section 1982); *Tate*, 1982 WL 361 *1 ("employment relationship does not implicate any of the concerns of section 1982").

Thus, it is evident that courts interpreting this provision of the reconstruction-era civil rights acts have not been willing to stretch the meaning of property so far as to encompass employment at will.

5. 42 U.S.C. § 1985

The relevant provisions of 42 U.S.C. §§ 1985(2)-(3) are as follows:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness

in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of having so attended or testified . . ..

(3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property . . . the party so injured . . . may have an action for the recovery of damages . . ..

This Court has held that Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). While the majority of this Court in *Novotny* found it unnecessary to reach the question of "whether § 1985(3) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution," *id.* at 370 n.6, Justice Powell, while concurring, stated:

> I would take advantage of the present opportunity to make clear that this Civil Rights Era statute was intended to provide a remedy *only* for conspiracies to violate

> fundamental rights derived from the Constitution.

Id. at 381 n.*. Justice Powell also noted that "this Court has never held that the right to any particular private employment is a 'right of national citizenship' or derives from any other right created by the Constitution." *Id.* at 381.

With this context we can turn to the question of what constitutes injury to person or property within the meaning of Section 1985.

Termination of an at will contractual relationship has been held not to be injury to person or property within Section 1985. In *Gill v. Farm Bureau Life Ins. Co. of Missouri*, 906 F.2d 1265 (8th Cir. 1990), the plaintiff brought a claim under Section 1985 based upon the termination of his at will agency relationship with the defendant insurance company. Rejecting the plaintiff's claim, the Eighth Circuit held:

> The colorfully sinister words at the beginning of § 1985(c) itself convey the picture of nightriders who "go in disguise upon the public highway or upon the premises of another" to commit their violent misdeeds. The victim "injured in his person or property" was surely contemplated by Congressmen in 1871 as suffering something more severe than loss of

> commissions as an insurance agent. Indeed, such loss in [plaintiff's] case was damnum sine injuria, for [plaintiff's] contracts themselves contained express provisions permitting cancellation upon written notice.

Id. at 1269-70.

Two circuits have held that employment at will does not constitute property within the meaning of Section 1985. The first was the Eleventh Circuit in *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987). While the Eleventh Circuit opinion in *Morast* does not specifically refer to "property," a review of the district court opinion evidences that the Eleventh Circuit was referring to "property" when it found no injury. The district court opinion states:

> Finally, the allegation that plaintiff was injured in his "person or property," cannot stand. The function of a conspiracy action for a violation of civil rights is compensatory. The plaintiff must have suffered an actual injury to make out a cause of action. For reasons that shall be discussed later, plaintiff, as an at-will employee, had no constitutionally cognizable property interest in his job. Therefore his only complained of injury, his loss of employment, cannot suffice to state a claim under this statute.

Morast v. Lance, 631 F. Supp. 474, 479 (N.D. Ga. 1986).

The Seventh Circuit in *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991) reached the same conclusion. While considering the plaintiffs' claims under 42 U.S.C. § 1983 for violation of the Fourteenth Amendment Due Process Clause, the Seventh Circuit held the plaintiffs had failed to show a protected property interest in their employment. Having found employment at will was not property within the meaning of the Fourteenth Amendment, the court also concluded there was no injury to property under Section 1985. *Id.* at 468-69; *see also, Lim v. Central DuPage Hosp.*, 871 F.2d 644, 646, (7th Cir. 1989) ("[t]he parties have agreed that 'property' means the same in [Section 1981, 1982 and 1985] as in section 1983, and we need not go behind this stipulation.").

The circuit court cases relied upon by Petitioner to support the proposition that at will employment is "property" within the meaning of Section 1985 are not based upon any legal authority. The first of the cases, *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983), merely declares, without citation, that: "'Property' here must include any economic damage that would be recognized in an ordinary tort suit." The second case, *Wright v. No Skiter Inc.*, 774 F.2d 422, 426 (10th Cir. 1985), does not even address the issue of what constitutes injury to property under Section 1985, but simply relies on *Irizarry*. *Portman v. County of Santa Clara*, 995 F.2d 898, 909-10 (9th Cir. 1993), the third case, relies solely on

Irizarry and *Wright*. Thus, when traced back to its origins, the proposition that employment at will is "property" for Section 1985 is without support.

Having failed to find support in the contemporaneous enactments that use the term "property," Petitioner and *amici curiae* instead rely upon a case interpreting the term property under the antitrust laws, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). *Reiter*, which simply holds that the loss of money is injury to property within the meaning of the Clayton Act, has no relevance here. *Reiter* interprets a word used in a different and unrelated set of Congressional enactments and makes no reference to employment at will.

The body of jurisprudence interpreting the interrelated and contemporaneous set of reconstruction-era civil rights enactments establishes that employment at will is not "property." To reach a different conclusion would not only be contrary to previous holdings of this Court, it would expand the meaning of the other reconstruction-era civil rights enactments beyond all previously recognized bounds.

B. The Plain Language Of Section 1985 And Its Legislative History Do Not Authorize A Claim Based On The Termination Of At Will Employment.

There is nothing, either in the plain language of Section 1985 or its legislative history, that demonstrates

Congress intended to provide a civil remedy for the termination of at will employment. There is no reference in the statute to termination of employment or any other type of employment related action.

This is in contradistinction from the Civil Rights Act of 1870 (also known as the Enforcement Act) enacted less than a year before the parent of Section 1985.[7] Section 5 of the Enforcement Act provided:

> That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of *depriving such person of employment or occupation*, or of ejecting such person from rented house, lands, or other *property*, or by threats of refusing to renew leases or *contracts for labor*, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor . . ..

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[7] The voting rights provisions of the Enforcement Act were repealed in 1894. The criminal prohibition against deprivation of civil rights, with modifications, remains as 18 U.S.C. § 241.

Enforcement Act, ch. 114, 16 Stat. 140, 141 (1870) (repealed 1894) (emphasis added).

It is thus evident that the reconstruction-era Congress, when it so intended, specifically protected employment occupation and contracts of labor, in addition to property. The reconstruction-era Congress, however, chose not to include employment, occupation or contracts of labor in Section 1985.[8]

The legislative history of Section 1985 supports this analysis. The legislative history does not contain any reference to the termination of employment being prohibited under the statute. While the Congressional debate did not focus on Congress' intent regarding injury to "person or property," the debates provide an indication of members' concerns. Congress was alarmed at the violence sweeping the south. They often referred to the situation with the Klan as a "war" and strived for the "establishment of peace and order." Cong. Globe, 42d Cong., 1st Sess. 339 (1871) (statement of Rep. Kelley).

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[8] Congress on numerous occasions specifically has provided remedies for retaliation in the terms and conditions of employment for exercising rights provided for by law. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-3(a); Energy Reorganization Act, 42 U.S.C. § 5851(a); False Claims Act, 31 U.S.C. § 3730(h); Age Discrimination in Employment Act, 29 U.S.C. § 623(d); ERISA, 29 U.S.C. § 1140; Labor-Managements Relations Act, 29 U.S.C. § 158(a)(4); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); Federal Employers Liability Act, 45 U.S.C. § 60.

Representative Stoughton recounted the testimony of one man during Congressional hearings who reported that people would not testify against the Klan in court because they were afraid their lives would be placed in danger. Cong. Globe, *supra*, at 320-21. The man testified that on one occasion the Klan came to his house and shot at him through his front door when he would not come outside. *Id.*

During the debates, members of Congress often referred to the types of injuries caused by the Klan: "murdered, brutally beaten, or driven away at the peril of their lives" *id.* at 321 (statement of Rep. Stoughton); "scourgings, burnings, and butcheries" *id.* at 516 (statement of Rep. Shellabarger); "by means of burning, stealing, whipping [and] murder" *id.* at 517 (statement of Rep. Shellabarger).

The Civil Rights Act of 1871 was introduced and passed five years after the organization of the Klan. *See McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980). During that five year period, the Klan violently resisted reconstruction and frequently attacked federal officials, African-Americans, and Union sympathizers. *See id.* The Southern States' governments seemed unable or unwilling to respond to the Klan's violence. *See Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 350 (5th Cir. June 1981) (enbanc) (Johnson, J., dissenting), *cert. denied*, 454 U.S. 1110 (1981), *overruled in part on other grounds by Kush v. Rutledge*, 460 U.S. 719 (1983). As a result, President Grant sent a message to Congress asking for authority to

control the "condition of affairs . . . rendering life and property insecure." Cong. Globe, *supra*, at 236.

Absent in the legislative history is any discussion of employment, at will or otherwise, in regard to Section 1985. Indeed, neither Petitioner nor any of the *amici curiae* cite to any legislative history that reflects a Congressional intent to prohibit the termination of at will employment. Thus, neither the plain language of Section 1985 nor its legislative history provide any support for Petitioner's contention that the statute prohibits termination of at will employment.

C. That Employment At Will Is Not Property Is Consistent With Property And Employment Rights At The Time Of Passage Of The Civil Rights Act Of 1871.

The overarching consideration in determining whether a property interest exists is whether the interest is protected and enforceable by law. As Judge Learned Hand stated, "[o]rdinarily a person has 'property' in a thing if he has untrammelled freedom to use it as he wills and may invoke legal sanctions to protect that freedom." *Helvering v. Elias*, 122 F.2d 171, 172 (2d Cir. 1941). The concept that a party must have a legal right to enforce a property interest is not a recent phenomena. It clearly predates the passage of the Civil Rights Act of 1871. In an 1820 decision, New York's Supreme Court recognized that "*[p]roperty* is defined to be . . . that right which one hath . . . *which no way depend on another man's courtesy.*"

Jackson v. Housel, 17 Johns. 280, 283 (N.Y. Sup. Ct. 1820) (second emphasis added); *see also, Stief v. Hart*, 1 N.Y. 20, 24 (1847) (same definition of "property" quoting Jacobs Law Dictionary).

The appellate court of Maine, in an 1841 decision, rejected a plaintiff's claim for the lost wages of the plaintiff's son, finding that the future earnings of the son were not property. *Reed v. Inhabitants of Belfast*, 20 Me. 246 (1841). The statute at issue in *Reed* provided for recovery of damages:

> [i]f any person shall lose a limb, break a bone, or receive any other injury in his person, or in his horse, team or *other property*.

Id. at 248. The Court examined the legislative intent of the statute and held:

> The fruits which we may expect to reap from the future earnings of our children can, in nowise be considered as present property, liable to be damaged or injured; or at any rate not such as could be considered as having been in view by the legislature, when they speak of injuries to the property of any one. We must suppose that the legislature used the word property in its obvious and ordinary sense, and are not at liberty to seek

> for a hidden, abstruse or far fetched construction of it.

Id. at 249-50. *Reed* is instructive both in its exploration of the meaning of property and its resistance to imposing unintended interpretations of legislation.

At the time of the passage of the Civil Rights Act of 1871, not only were there no limitations on an employer's right to enter into and terminate employment relationships,[9] Congress and the courts were vigilant in protecting the rights of both employers and employees to freely enter into and terminate employment relationships. In *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion),[10] then Associate Justice Rehnquist provided a synopsis of the development of federal civil service protections:

> For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might

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[9] At will employment is by definition only applicable when there is not an enforceable employment contract. Thus, an employee always had the ability to bring suit on a contract.

[10] A federal employee's property interest in employment under the Fifth Amendment Due Process Clause is coextensive with that of a state employee bringing a 42 U.S.C. § 1983 claim under the Due Process Clause of the Fourteenth Amendment. *Arnett*, 416 U.S. at 151; *Paul*, 424 U.S. at 702 n.3.

> appeal to the responsible executive hiring officer. Following the Civil War, grass -roots sentiment for "Civil Service reform" began to grow, and it was apparently brought to a head by the assassination of President James A. Garfield on July 2, 1881. . . . Responding to public demand for reform . . . Congress in January 1883 enacted the Pendleton Act.
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> While the Pendleton Act is regarded as the keystone in the present arch of Civil Service legislation, by present-day standards, it was quite limited in its application . . .. Its only provision with respect to separation was to prohibit removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service.
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> Prior to the enactment of [the Lloyd-La Follette Act] in 1912, there was no statutory inhibition on the authority of the Government to discharge a federal employee, and an employee could be discharged with or without cause . . ..[11]

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[11] The only exception to the at will employment of federal employees prior to 1912 was for conduct protected under the First Amendment. As discussed *infra* at 40-41, this exception is limited to government employees and arises from fundamental rights protected by the First Amendment. Petitioner is not alleging state action and First Amendment limitations are immaterial.

416 U.S. at 148-49, 158.

This virtually unlimited right to discharge federal employees for any reason mirrored the right of private employers to terminate employment relations. This unrestricted freedom in employment decisions at the time of the passage of the Civil Rights Act of 1871 is reflected in the Court's decision in *Adair v. United States*, 208 U.S. 161 (1908).[12] In *Adair*, an agent of an employer was criminally prosecuted for terminating the employment of an individual in retaliation for the individual's membership in a labor organization. *Id.* at 170. This Court found the statute under which the employer's agent was prosecuted unconstitutional and held:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

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[12] *Adair* was subsequently limited by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and other decisions. However, for purposes of determining Congressional intent when passing the Civil Rights Act of 1871, *Adair* is instructive in employment rights in the latter half of the 19th century.

* * *

> [I]t is not within the functions of government – at least, in the absence of contract between the parties – to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.
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> * * *
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> In absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.

Id. at 173-76.

Adair reflects employment rights at the time of the passage of the Civil Rights Act of 1871 and is consistent with the legislative history of the statute. As *amicus curiae* notes, there was concern over the abilities of northerners to come south and enter into business. (Brief of *Amicus Curiae* National Whistleblower Center at 16.) Consistent with *Adair* and the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the concern of Congress was the ability of parties to freely enter into and terminate business relationships.[13] Indeed, at the time of enactment of the Civil Rights Act of 1871, Congress was more likely

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[13] *Amicus curiae* National Whistleblower Center takes quotations out of context from the *Slaughter-House Cases* and misstates the significance of the quotations in claiming that the Court recognized a property interest in continued employment. (Brief of *Amicus Curiae* National Whistleblower Center at 12.) Contrary to *amicus curiae's* assertion, the Justices in the *Slaughter-House Cases* were employing reasoning identical to that of the Court in *Adair*. In the *Slaughter-House Cases*, reference was made to the right of employers and employees to both enter into and terminate employment relations at will. The quotations by *amicus curiae* relate to the right of an employee to enter into and terminate an employment relationship at will. The portions of the decision quoted are focused on the prohibition against compelling an employer or employee to enter into or remain in an undesired employment relationship. One thing that the various opinions in the *Slaughter-House Cases* do not state is that an employee has any right to legally compel continued employment against the will of the employer. The cases do not establish any right to compel continued employment against the wishes of either employer or employee and, in fact, hold just the opposite. Accordingly, both *Slaughter-House Cases* and *Adair* affirmatively established that there was no right to compel continued employment at the time of the passage of the Civil Rights Act of 1871.

to have intended it to be a violation of a person's civil rights to compel an employer or employee to continue in an employment relationship against their will.

D. Petitioner Has No Property Interest In His At Will Employment Under Georgia Law.

Petitioner concedes he was an at will employee under Georgia law. (Petitioner's Brief at 7). Under Georgia law it is well established:

> [W]here an employee's employment is terminable at will, an employer with or without cause and regardless of its motives, may discharge the employee without liability.

Runyon v. Economics Lab., Inc., 248 S.E.2d 44, 46 (Ga. App. 1978); *see also, Georgia Power Co. v. Busbin*, 250 S.E.2d 442 (Ga. 1978). Accordingly, Petitioner may not assert a retaliatory discharge claim against his employer under Georgia law.

In *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051 (5th Cir. Unit A July 1981), the plaintiff claimed that his employment was terminated in retaliation for his testimony in a federal lawsuit against his employer. In reversing the judgment for the plaintiff, the Former Fifth Circuit held:

> The Georgia courts have uniformly followed the at will rule, holding that an employee at will has no cause of action, whether characterized as sounding in tort or in contract, against its employer for an alleged wrongful discharge.

Id. at 1054. Similarly, the plaintiff in *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (5th Cir. Unit B Sept. 1981), alleged that his employment was terminated in retaliation for investigating possible illegal activities by his employer. The court affirmed the judgment for the defendants and rejected the plaintiff's request to create a public policy exception under Georgia law:

> Nevertheless, *plaintiff urges this court to find an exception to this rule since the reason for his termination was that he was about to uncover criminal activities. There is no room for this exception in Georgia* as this rule is statutory and the statute, Code § 66-101, does not encompass the exception.

Id. at 1031 (quoting *Goodroe v. Georgia Power Co.*, 251 S.E.2d 51, 51-52 (Ga. App. 1978)). The court also rejected the plaintiff's conspiracy claim because "the defendant corporation and its supervisory employees cannot 'conspire to do that which they legally were entitled to do.'" *Id.* at 1032 (citing *Georgia Power Co. v. Busbin*, 250 S.E.2d 442, 444 (Ga. 1978)).

Following this Court's holdings in *Roth* and *Bishop*, the Eleventh Circuit has held that at will employees do not have a property interest in their employment under Georgia law. In *Wofford v. Glynn Brunswick Mem'l Hosp.*, 864 F.2d 117 (11th Cir. 1989), the court affirmed the judgment for the defendant employer and held:

> It follows that, in Georgia, an at will employee typically does not have a reasonable expectation of continued employment sufficient to form a protectable property interest.

Id. at 119; *see also, Brett v. Jefferson County, Georgia*, 123 F.3d 1429, 1434 (11th Cir. 1997) ("public employee generally has no protected property interest"); *Nolin v. Douglas County*, 903 F.2d 1546, 1553 (11th Cir. 1990) ("no evidence from which a jury could conclude that [plaintiff] possessed a property interest in continued employment"), *overruled in part on other grounds by McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).[14]

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[14] For purposes of Georgia law, it is meaningless whether Petitioner attempts to couch his claim as an injury to "person" or "property." No matter how characterized, Petitioner has no claim for wrongful termination under Georgia law against his employer. *See Phillips*, 651 F.2d at 1054 ("employee at will has no cause of action, whether characterized as sounding in tort or in contract, against his employer for an alleged wrongful discharge").

E. The First Amendment Cases Provide No Support For Petitioner

The reliance of *amici curiae* on *Rankin v. McPherson*, 483 U.S. 378 (1987), *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996), is misguided. Respondents have not suggested that the termination of employment is not actionable if the decision is made in violation of a federal law prohibiting such. The law at issue here, though, does not contain such a prohibition.

The three cited decisions are based on First Amendment claims. The First Amendment decisions are distinguishable from this case for several reasons. The cases fall under the "liberty" protection of due process clause, not "property." *See Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925) ("freedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause"); *Whitney v. People of State of California*, 274 U.S. 357, 373 (1927) (Brandeis, J. concurring) ("fundamental rights comprised within the term liberty are protected . . . [and] the right of free speech . . .[is] a fundamental right[]"). *Roth* and *Bishop*, on the other hand, determined that at will employment was not "property" under the Due Process Clause.

In addition, the First Amendment cases focus on whether the state has infringed upon the parties'

constitutional right, i.e., freedom of speech. The overriding concern in the First Amendment cases is to stop "[s]uch interference with constitutional rights." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Finally, the First Amendment cases are brought under Section 1983 which provides that the "party injured" shall have an action "for redress."

Although enacted as part of the Civil Rights Act of 1871, Section 1983 does not limit recovery to injuries to "person or property" as Congress did in Section 1985. The lack of the restrictive phrase "person or property" allows for recovery of a greater range of injuries. Thus the First Amendment cases do not contain any holdings that expand the limits of property as found by the Court in *Roth* and *Bishop*.

III. PETITIONER AND *AMICI CURIAE* MISSTATE THE SIGNIFICANCE OF PETITIONER NOT BEING ABLE TO BRING A CLAIM UNDER SECTION 1985 BECAUSE PETITIONER AND THE FEDERAL COURT SYSTEM ARE ADEQUATELY PROTECTED BY OTHER STATUTES.

Petitioner and *amici curiae* contend that if Petitioner is unable to bring a claim under Section 1985, then employers will be allowed to intimidate and retaliate against employees without fear of recourse. These predictions of unrestricted intimidation and retaliation

activities by employers is unfounded and a gross exaggeration. At will employees that actually are discharged because of their testimony in a federal court proceeding have existing civil remedies. Moreover, there are criminal statutes employers will violate by engaging in such activities.

As evidence of these other remedies, in his Complaint Petitioner brought tortious interference with employment relations and Georgia RICO claims against Respondents. Both of the state law claims were based on the alleged retaliatory termination of Petitioner's employment for his testifying in a federal court proceeding. (App. 12-14, ¶¶ 26 and 34.) The Georgia courts determined on summary judgment that the state law claims asserted by Petitioner are unsupported by the evidence. (App. 53-60.) In a strange twist, Petitioner contends that because his state law claims were unsuccessful, he now needs a remedy under Section 1985. (Petitioner's Brief at 27.)

In addition, Petitioner could possibly have brought an action against his employer under the anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h). That statute prohibits an employer from discharging an employee for undertaking lawful acts in furtherance of an action filed or to be filed under the False Claims Act. *See, e.g., Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1080 (1997). For whatever reason, Petitioner chose not to do so.

Moreover, the greater deterrence to employers against intimidating or retaliating against employees is criminal statutes prohibiting obstruction of justice. *See, e.g.*, 18 U.S.C. § 1503 (Obstruction of justice); 18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies and committees); 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant); *see also*, 18 U.S.C. § 1514 (Civil action to restrain harassment of a victim or witness). Employers face significant incarceration and fines under the criminal statutes.[15] The criminal statutes negate any contention that employers will engage in acts of intimidation and retaliation unless at will employees are allowed to assert claims under Section 1985.

IV. PETITIONER'S CLAIM WAS PROPERLY DISMISSED ON ALTERNATIVE BASES.

A. Petitioner Does Not Prevail Based Upon The Circuit Court Opinions Upon Which He Relies.

Petitioner relies on the Ninth Circuit decision in *Portman v. County of Santa Clara*, 995 F.2d 898 (9th Cir.

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[15] In addition, as Petitioner asserted in his Georgia RICO claim, 18 U.S.C. § 1503 is a predicate act under both the federal RICO statute and the Georgia RICO statute. Accordingly, although no civil claims are allowed directly under the statute, *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123 (10th Cir. 1953), Petitioner had a civil cause of action (ultimately unsuccessful) based on the alleged obstruction of justice.

1993). (Petitioner's Brief at 21-22.) However, Petitioner's claim also would have been dismissed under the Ninth Circuit's interpretation of Section 1985. This is because the Ninth Circuit requires that there be injury to a *party* in a federal court proceeding.

Although not at issue in *Portman*, the Ninth Circuit made the requirement of injury to a party in an underlying action absolutely clear in *David v. United States*, 820 F.2d 1038 (9th Cir. 1987). In *David*, the Section 1985 plaintiff claimed she had been discharged from her employment because of her acting as a witness in a separate federal court proceeding (to which the Section 1985 plaintiff was *not* a party). The Ninth Circuit held:

> David [the Section 1985 plaintiff] has not alleged how *she* has been injured by her testimony in *Parodi* [the separate federal court proceeding] or her failure to appear in court. Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the *litigant* was hampered in being able to present an effective case. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under § 1985(2).

Id. at 1040 (citation omitted).

In *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983), it also was specifically noted that the "[p]laintiffs have proved that they were denied reemployment because they previously had instituted legal actions to vindicate their federal rights." *See also, Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1180 (7th Cir. 1989) ("Congress intended to provide a damage-remedy only for litigants . . .. Otherwise the term 'witness' would have been contained in those remedial provisions."); *cf. Rode v. Dellarciprete*, 845 F.2d 1195, 1206-07 (3d Cir. 1988).

The Ninth Circuit also has held that it is not enough that the Section 1985 plaintiff at one time was a party to a prior federal proceeding if the federal claims were dismissed. On remand from *Kush v. Rutledge*, the Ninth Circuit in *Rutledge v. Arizona Board of Regents*, 859 F.2d 732, 735-36 (9th Cir. 1988) found that because the federal court proceeding had been dismissed and was barred, the plaintiff could not show the alleged conspiracy affected his ability to present a case and thus could show no injury.

Unlike the plaintiffs in *Irizarry, Rutledge* and *Portman*, Petitioner was a potential witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was unaffected, and he therefore has suffered no "actual injury."

Moreover, there is no allegation that Petitioner was in any way hindered or prevented from cooperating with the government and testifying. Thus, Petitioner was not

injured in his ability to testify. *Rylewicz*, 888 F.2d at 1181 ("no allegation . . . hampered from testifying 'freely, fully, and truthfully,' . . .. Plaintiffs have simply not pointed to an injury . . . within the scope of Section 1985"). Since it is the interest in being able to litigate a party's case fully in the federal courts that constitutes the protected federal interest under *Irizarry* and *Portman*, only parties hampered in their ability to litigate federal actions have standing under Section 1985. Because Petitioner had no such federal interest implicated and was not injured, it was proper to dismiss his Section 1985 claim.

B. Petitioner Failed To Plead Force, Intimidation Or Threat Sufficiently.

Under Section 1985(2), two or more persons must conspire to deter testimony by use of "force, intimidation or threat." As previously discussed, when the Civil Rights Act was passed in 1871, Congress intended that the statute inhibit members of the Ku Klux Klan from using lynchings, whippings and other acts of violence to obtain political control in the south. Paragraphs 18, 19, and 20 of Petitioner's Complaint, which purport to set out the force, intimidation or threat, focuses solely on the termination of Petitioner's employment. (App. 10-11, ¶¶ 18-20.)

The Eleventh Circuit held in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), that such allegations are insufficient as a matter of law to establish "force, intimidation or threat." In *Morast*, the plaintiff's employment was terminated allegedly for the plaintiff's

cooperation with federal regulators. In *Morast*, the plaintiff alleged the defendants acted angry, upset and vindictive toward plaintiff, questioned the plaintiff about press leaks, excluded plaintiff from meetings, and decreased his work load. *Morast v. Lance*, 631 F. Supp. 474, 479 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987). As one of its bases for granting defendants' motion to dismiss, the district court stated: "Plaintiff's complaint is essentially void of the factual allegations necessary to support a claim under section 1985(2)." *Id.*

The Eleventh Circuit, in affirming the district court's grant of the motion to dismiss on this particular ground, stated:

> Morast has not alleged that the defendants conspired to stop him from attending or testifying at the hearing by "force, intimidation, or threat." Morast contends only that defendants retaliated against him with anger and vindictiveness, extensive questioning regarding leaks to the press, exclusion from board meetings, and a decreased workload.[4]

[4] The remainder of Morast's list of "retaliations" are conclusory in nature and are not specific examples of acts to deter testimony or

> attendance by "force, intimidation, or threat."

Morast, 807 F.2d at 930.

The Eighth Circuit addressed the requirement of "force, intimidation, or threat" in *Gill v. Farm Bureau Life Ins. Co. of Missouri*, 906 F.2d 1265 (8th Cir. 1990). In *Gill*, an insurance agent in an at will contractual relationship had the agency relationship canceled. Finding the allegations in the complaint insufficient, the Eighth Circuit stated:

> Viewed in the light of its origins, as a reaction against the "murders, whippings, and beatings committed by rogues in white sheets in the post bellum south," the Ku Klux Klan Act obviously meant to its framers, when it spoke of "force, intimidation, or threat" something much more serious and terrifying than a written notice of cancellation of a contract designating [plaintiff] as an agent to sell Farm Bureau Insurance.

Id. at 1269.

In another decision addressing what satisfies the "force, intimidation, or threat" requirement, Judge Meskill of the Second Circuit strenuously argued that "force, intimidation or threat" should "require evidence of

physical force, threats of violence or similarly malevolent acts." *Keating v. Carey*, 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting). Accordingly, Petitioner has failed to plead sufficiently "force, intimidation or threat," and his Complaint properly was dismissed.

CONCLUSION

For the reasons given above, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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August 27, 1998

(11)

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

MICHAEL A. HADDLE,
Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES I through N, individually and as Trustees of certain trusts,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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BRIEF ON THE MERITS OF RESPONDENT G. PETER MOLLOY, JR.

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QUESTION PRESENTED

Whether an at-will employee who alleges that his employment was terminated pursuant to a conspiracy to retaliate against him for appearing, but not testifying, before a grand jury and to deter him and others from appearing and testifying as witnesses in federal court, has been "injured in his person or property" under 42 U.S.C. Section 1985?

LIST OF PARTIES

The parties to the proceeding are all named in the caption hereof.

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STATEMENT OF THE CASE

Petitioner Haddle filed an action in the District Court for the Southern District of Georgia asserting one federal claim under 42 U.S.C. Section 1985(2) and several state law claims against Respondents Jeanette Garrison, Healthmaster, Inc. (n/k/a "HLM"), G. Peter Molloy, Dennis Kelly and others. Respondents Garrison and HLM filed Motions to Dismiss which Respondents Molloy and Kelly joined. The District Court dismissed Haddle's 42 U.S.C. Section 1985(2) claim under the binding precedent of the Eleventh Circuit's holding in Morast v. Lance, 807 F.2d 926 (11th Cir. 1987). The District Court also dismissed Haddle's state law claims without prejudice after declining to exercise supplemental jurisdiction over them. Haddle appealed to the United States Court of Appeals for the Eleventh Circuit which issued an opinion and judgment adverse to him on December 5, 1997. Haddle timely filed a Petition for a Writ of Certiorari to this Court.

Petitioner Haddle did not appeal the dismissal of his state law claims. He re-filed his state law claims in the Superior Court of Richmond County, Georgia, in an action captioned Haddle v. Garrison, et al., Civil No. 96-RCCV-572. The Richmond County Superior Court subsequently granted summary judgment to all defendants on all claims asserted by Petitioner. The Georgia Court

of Appeals affirmed the grant of summary judgment. The Court of Appeals affirmed the grant of summary judgment and denied Petitioner's Motion for Reconsideration. (Respondents' Motion to Dismiss Writ of Certiorari as Improvidently Granted, P. 3.)

The District Court dismissed Petitioner's case on a Motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure without considering any evidence outside of the pleadings. Therefore, the relevant facts are the allegations contained in Petitioner's amended complaint (J.A. 17-28) which must be taken as true for this review.

From September 22, 1986 until approximately April 13, 1995, Haddle was an employee of HLM. (J.A. 19, Paras 7&9). On March 8, 1995, Garrison, HLM and others, but not Molloy, were indicted in the United States District Court for the Southern District of Georgia. (J.A. 19, Para. 12). In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), a wholly owned subsidiary of HLM filed for protection under Chapter 11 of the Bankruptcy Code. (J.A. 19, Para 9). In connection with the bankruptcy proceeding, most of the employees of HLM, including Haddle and Molloy, transferred their employment to HHHC. (J.A. 19, Paras 8 & 9). The Bankruptcy Court appointed a Trustee to oversee the affairs of HHHC. The Bankruptcy Court-appointed Trustee elected to retain Respondent Molloy as the President of HHHC. (J.A. 20, Para 16).

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Haddle alleges that he cooperated with federal agents. Haddle was subpoenaed to go before the grand jury but admits that he did not testify due to the press of time. (J.A. 20, Para 14). Haddle does not allege that he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges that he was to be a potential witness in the criminal case against others.

On June 21, 1995, Molloy, then president of HHHC, with the approval of the Bankruptcy Trustee, terminated Haddle's employment with HHHC. (J.A. 20, Para 16). Haddle alleges that Molloy terminated Haddle's employment on the instructions of Jeanette Garrison, Kelly, and HLM in retaliation for Haddle's purported cooperation in the criminal investigation and in an attempt to intimidate Haddle from testifying in the federal criminal trial against others. (J.A. 20, Para 16). Petitioner did not allege that he was threatened with force or violence by any of Respondents or that the Government ever investigated or charged any of Respondents with obstruction of justice.

Petitioner includes in his Petition and Brief factual allegations regarding testimony by Robert Pittard and rulings in the case of O'Neal v. Master Health Plan, Inc. No. 96-028 (S.D.Ga.).

(Petitioner's Brief at P.5 &6). Although none of the references to Mr. Pittard or the O'Neal case are part of the record, Petitioner argues that this Court may take judicial notice of matters in the public record which support the allegations of his Petition. (Petitioner's brief, P 5). However, this Court has repeatedly held that parties may only rely on, and the Court may only consider, information that is part of the record. Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 486 n.3 (1986).

Assuming, however, that this Court chooses to consider the O'Neal case, it does not support Haddle's allegations against Respondent Molloy. Instead the O'Neal case supports Respondent Molloy because the trial court granted judgment as a matter of law to Molloy on the claim that Molloy had been involved in terminating O'Neal's employment. Trial Judge Anthony J. Alaimo expressly ruled:

> Well, I do not know of any evidence that tied him [Molloy] into the discharge or the placing on administrative leave. So I am going to grant that motion. ... He was just purely a message carrier. Under the evidence that I have heard here, that is all he was. ... There is no evidence whatever that he participated in the employment decision

> to discharge him or put him on administrative leave. [Tr (Vol 3): 215-216].

The O'Neal case is not proof that Respondent Molloy engaged in a conspiracy to injury Haddle or O'Neal. The case is a factual finding by the District Court Judge that Respondent Molloy did not engage in any wrongful conduct.

SUMMARY OF ARGUMENT

A. Petitioner Haddle was not "injured in his person or property" within the meaning of 42 U.S.C. Section 1985 as a result of the termination of his at-will employment. In interpreting the other post Civil War Civil Rights statutes enacted with Section 1985, this Court has consistently held employees do not have a property interest in their at-will employment.

B. This Court's decisions that at-will employment is not "property" under the Due Process Clause are consistent with the understanding of employment rights at the time of passage of the post Civil War Civil Rights Acts. At-will employment was interpreted then to mean that the employer had the unlimited right to dismiss his employees for any reason without government interference. The Court echoed this widely held view in its

decision Adair v. United States, 200 U.S. 161 (1908).

C. The plain language of 42 U.S.C. Section 1985 does not support a claim based on the termination of at-will employment. There is no reference in the statute to protection of at-will employment. The term "employment" does not even appear in the statute.

D. Petitioner has no property interest in his at-will employment under Georgia law. Where an employee's employment is at-will, an employer with or without cause and regardless of its motive may discharge the employee without liability.

E. Congress uses explicit language when it wishes to protect an interest. Congress has not used language to demonstrate that it intended to protect at-will employment in Section 1985. Congress has passed other statutes which do afford protection to at-will employees.

F. Petitioner is not a proper party to raise a claim under Section 1985(2). This statute exists for the benefit of litigants whose ability to present an effective case in federal court has been hampered. It is the party's interest in being able to fully litigate his case in a federal court that is the protected federal interest. A

witness such as Petitioner as no such interest.

ARGUMENT

I. Petitioner Was Not "Injured in His Person or Property" Within the Meaning of 42 U.S.C. Section 1985 as a Result of the Termination of His At-Will Employment.

Petitioner Haddle brings this claim under 42 U.S.C. Section 1985 which requires that a party be "injured in his person or property." 42 U.S.C. Section 1985(3). This Court has consistently held that property rights are not implicated as a result of the termination of at-will employment. Although this Court has not yet addressed the limits of injury to "person or property" under Section 1985(3), it has held that the term "property" does not encompass termination of at-will employment in interpreting the other civil rights statutes enacted with 42 U.S.C. Section 1985. To expand the concept of "property" under 42 U.S.C. Section 1985(3) to include termination of at-will employment would be inconsistent with this Court's interpretation of "property" in the other civil rights statutes and with Congress's understanding of employment rights at the time 42 U.S.C. Section 1985 was enacted.

A. This Court Has Not Interpreted the Term "Property" in the Post Civil War Civil Rights Statutes to Encompass Termination of At-Will Employment.

The statute in this case, 42 U.S.C. Section 1985, is part of the civil rights legislation that Congress passed after the Civil War. This post Civil War legislation also included other statutes which are now codified as 42 U.S.C. Sections 1981, 1982 and 1983. The statutes all either contain express protections of "property" or have been interpreted to protect "property".

42 U.S.C. Sections 1981 and 1982 originated in the Civil Rights Act of 1866. 42 U.S.C. Sections 1983 and 1985 originated in the Civil Rights Act of 1871. There is no basis for interpreting the definition of "property" differently under Section 1985 than under Sections 1981, 1982 or 1983. It makes sense that the same term used in these statutes should be interpreted the same way. In Tillman v. Wheaton - Haven Recreation Association, Inc. 410 U.S. 431, 440 (1973), this Court stated that "...in light of the historical inter- relationship

between Section 1981 and Section 1982, we see no reason to construe the sections differently when applied... ."

Section 1981, as originally enacted, provided:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

(Emphasis added).

This Court has previously held that 42 U.S.C. Section 1981 does prohibit discrimination in employment matters. However, this Court also held that such protection did not fall under the "persons and property" (emphasis added) portion of the statute but under the "make and enforce contracts" clause. Runyon v. McCreary, 427 U.S. 160, 168 (1976).

This Court also made clear that the "persons and

property" clause of Section 1981 does not apply to termination of at-will employment in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In Patterson, a black former employee of a credit union brought suit under Section 1981 claiming racial harassment and other job discrimination. This Court held that Section 1981 did prohibit racial discrimination in making and enforcing private contracts. However, the Court further held that racial harassment in the course of employment is not actionable under Section 1981 because the statute covers only conduct at the initial formation of the contract and conduct which interferes with the right to enforce contractual obligations through legal process. The Court especially held that Section 1981 did not encompass the termination of employment. 491 U.S. at 177.

After Patterson, Congress passed Section 101 of the Civil Rights Act of 1991 which added the following provision to 42 U.S.C. Section 1981:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination

> of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. Section 1981(b). (Emphasis added.)

Runyon and Patterson make it clear that this Court never interpreted Section 1981 to address the termination of employment. Congress recognized that employment was not a protected property interest under 42 U.S.C. Section 1981 when it amended the statute in 1991 to add protection against termination of employment.

42 U.S.C. Section 1982 provides:

> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Courts have consistently held that 42 U.S.C. Section 1982 does not protect termination of employment. Jurado v.

Eleven-Fifty Corporation, 630 F.Supp. 569, 572, aff'd 813 F.2d 1406 (9th Circuit, 1987); Abel v. Bonfanti, 625 F.Supp. 263, 269 (S.D.N.Y. 1985).

Section 42 U.S.C. Section 1983 in relevant part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress... .

Although Section 1983 does not specifically refer to "property," it has been long acknowledged that Section 1983 encompasses the rights provided by Section 1 ("the Due Process Clause") of the Fourteenth Amendment. That Clause

states that no person shall be deprived of "...life, liberty or property, without due process of law... ."

In Lynch v. Household Finance Corporation, 405 U.S. 538 (1972), this Court traced the origin of Section 1983 to the Civil Rights Act of 1871 which was derived from the Civil Rights Act of 1866. 405 U.S. 543-544. The Court then went on to hold:

> Not only was Section 1 of the 1871 Act derived from Section 2 of the 1866 Act, but the 1871 Act was passed for the express purpose of "enforcing the Provisions of Fourteenth Amendment."

405 U.S. at 545.

The Court then stated:

> It cannot be doubted that among the Civil Rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy,

own and depose of property. The quality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of the other basic civil rights and liberties which the Amendment was intended to guarantee. Shelley v. Kramer, 334 U.S. 1 10, 68 S.Ct. 836, 841, 92 Law.Ed. 1161.

405 U.S. at 544.

This Court held that at-will employment does not create a property interest under 42 U.S.C. Section 1983 in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Roth was an assistant professor without tenured rights to continued employment who was informed that he would not be rehired after his first academic year. He filed suit under Section 1983 alleging that the University's decision, without a reason or a hearing, not to rehire him deprived him of his Fourteenth Amendment property rights. This Court expressly held that the professor did not have a property interest protected by the Fourteenth Amendment and dismissed his claim. In particular,

the Court held:

> Certain attributes of "property" interest protected by procedural due process emerge from these decisions. To have a property interest and a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.
>
> * * *
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits

and that support claims of entitlement to those benefits.

* * *

Thus, the terms of the Respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or university rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the Respondent surely had an abstract concern of being re-hired, but he did not have a *property* interest sufficient to require the university to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 577-578 (footnote omitted) (emphasis in original).

This Court also held that at-will employment does not create a protected property interest in Bishop v. Wood, 426 U.S. 341 (1976). In Bishop, a former police officer brought an action alleging that termination of his at-will employment without a hearing was a violation of due process. This Court rejected the police officer's claim that he had a property interest of continued employment protected by federal law and held:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

426 U.S. at 345

> In this case, a holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had no property interest.

426 U.S. at 346, 345 n.8 (emphasis in original).

42 U.S.C. Section 1985(3) provides the damages for a violation of Section 1985(2). Section 1985(3) states in relevant part that if a person is:

> ...injured in his person or property, ...the party so injured or deprived may have an action for the recovery of damages occasioned by such injury... ."

In Morast v. Lance, 807 F.2d 926, the Eleventh Circuit held that a discharged vice-president of a national bank, who was an at-will employee, had no constitutionally protected interest in continued employment and therefore did not suffer an injury to his person or property as required by Section 1985.

Other courts, in addition to the Eleventh Circuit, have found that injury to "person or property" under 42 U.S.C. Section 1985 does not encompass termination of at-will employment. In Gill v. The Farm Bureau Life Insurance Company of Missouri, 906 F.2d 1265 (8th Cir. 1990), the Court rejected a claim brought by an insurance agent under Section 1985 based upon the termination of his agency relationship with the defendant insurance company. The

Eighth Circuit noted that:

> ...Gill's contracts themselves contain express provisions permitting cancellation upon written notice. These cancellation clauses constitute a second sufficient and independent ground for denying recovery to appellant Gill.

906 F.2d at 1269-1270.

In Perkins v. Silverstein, 939 F.2d 463 (7th Cir. 1991), former probationary police officers brought an employment discrimination suit under 42 U.S.C. Section 1983 and Section 1985 and other statutes. The Seventh Circuit dismissed the Plaintiffs' Section 1983 and Section 1985 claims because "...Plaintiffs failed to identify a protected property or liberty interest in their employment... ." 939 F.2d at 466.

In light of this Court's decisions that Section 1981, Section 1982, and Section 1983 do not protect at-will employment, Petitioner's reliance on Irizarry v. Queros, 722 F.2d 869 (1st Cir. 1983) and Portman v. County of Santa Clara,

995 F.2d 898 (9th Cir. 1999) for the proposition that loss of at-will employment is loss of a property interest is not persuasive. The Court in Irizarry conclusarily stated that "property" would include "...any economic damage that would be recognized in an ordinary tort suit." 722 F.2d at 871. However, the Court did not explain how it arrived at this conclusion nor cite any authority for it.

The Portman Court acknowledged that it had not yet addressed the question of injury to property under Section 1985(2). However, the Court in Portman then failed to furnish any explanation or citation of authority for its conclusion that loss of at-will employment was a proper injury within the meaning of Section 1985. The Portman Court simply cited to Irizarry and Wright v. No. Skiter Inc., 774 F.2d 422 (10th Cir. 1985) and stated that it saw "no reason to depart from the approach of those cases... ." 995 at 910.

The unsupported conclusions in Portman and Irizarry are contrary to the meaning of "property" in the other post-Civil War civil rights statutes.

B. This Court's Decisions That At-will Employment

Is Not "Property" under the Due Process Clause Are Consistent with the Understanding of Employment Rights at the Time of Passage of the Post Civil War Civil Rights Acts.

Contrary to Petitioner's arguments, at-will employment was not consider a property right at the time of the passage of the Civil Rights Act of 1866 or the Civil Rights Act of 1871.

In 1877, the American commentator H. G. Wood, set forth his view of the law of at-will employment:

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will and if the servant seeks to make out a yearly hiring the burden is upon him to establish it by proof... . Unless the understanding was mutual that the service was extended for a certain fixed and indefinite period, it is an indefinite hiring and is terminable at the will of either party.

Wood, Law of Master & Servant, 272 (1877).

Adair v. United States, 200 U.S. 161 (1908), was a review of a conviction of an agent of an interstate carrier for discharging an employee from service to such carrier because of the employee's membership in a labor organization. This Court reversed Adair's conviction and held unconstitutional the legislation which limited the power of employers to discharge employees because of their membership in a labor organization. In Adair, Justice Harlan stated:

> ...It is not within the function of government - at least, in the absence of contract between the parties - to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.
>
> * * *
>
> In all such particulars, the employer and

> employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

208 U.S. at 280-281.

In Arnett v. Kennedy, 416 U.S. 134 (1974), Justice Rehnquist noted that:

> For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might appeal to the responsible executive hiring officer. Following the Civil War, grass - roots sentiment for "Civil Service Reform" began to grow and it was apparently brought to a head by the assassination of President James A. Garfield on July 2, 1881.

416 U.S. at 148.

In sum, this Court's decisions and the legal commentators show that at the time of the passage of the Civil Rights Act of 1871, at-will employment was not considered "property" because the employer had the unlimited right to discharge an at-will employee.

C. The Plain Language of 42 U.S.C. Section 1985 Does Not Authorize a Claim Based on the Termination of At-Will Employment.

There is nothing in the plain language of 42 U.S.C. Section 1985 that demonstrates that Congress intended to provide a civil remedy for the termination of at-will employment. The statute makes reference to one who is "injured in his person or property".

There is no reference in the statute to termination of at-will employment let alone to the term "employment". Griffin v. Brekenridge, 403 U.S. 88 (1971) and Kush v. Rutledge, 460 U.S. 719 (1983) contained extensive discussions of the legislative history and purpose of Section 1985. Kush even

contains a full text of the original statute as an appendix. However, nowhere does the term "employment" appear.

D. Haddle Has No Property Interest in His At-will Employment under Georgia Law.

Haddle acknowledges that he was an at-will employee under Georgia law (Petitioner's Brief, P. 7). Section 34-7-1 of the Official Code of Georgia provides:

> If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at-will by either party. (Emphasis added)

In Runyon v. Economics Laboratory, Inc., 147 Ga.App. 53, 248 S.E.2d 44, 46 (1978) the Court held:

> Where an employee's employment is terminable at-will, an employer with or without cause and regardless of its motive, may discharge the employee without liability.

In Roth, this Court stressed that:

> Property interests, of course, are not created by the Constitution. Rather, they are created in the dimensions or defined by existing rules or understandings that stem from an independent source such as state law, rules or understanding that secure certain benefits and its support claims of entitlement to those benefits.

408 U.S. at 577-78.

In Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990), the Court in interpreting O.C.G.A. Section 34-7-1 held:

> Hence, under Georgia law an at-will employee "typically does not have a

> reasonable expectation of continued employment sufficient to form a protectable property interest." Wofford v. Glynn Brunswick Memorial Hospital, 864 F.2d 117, 119 (11th Cir. 1989) (per curiam).

903 F.2d at 1553.

E. When Congress Wishes to Prohibit Termination of At-will Employment, it Uses Explicit Language to Do So.

Petitioner asks this Court to search out a protection for at-will employment in the term "property" within the meaning of Section 1985. However, when Congress has sought to protect at-will employment, it has clearly done so. For example, Title VII, 42 U.S.C. Section 2000(E-3)(a); Americans With Disabilities Act, 42 U.S.C. Section 12203, False Claims Act, 31 U.S.C. Section 3730 (h); Age Discrimination and Employment Act, 29 U.S.C. Section 623(d); Fair Labor Standards Act, 29 U.S.C. Section 215(a)(3). The absence of any reference to protection of at-will employment in Section 1985 is an indication that Congress did not mean for that

statute to be a limitation on the right to terminate at-will employment.

F. Petitioner Is Protected by Other Adequate State and Federal Statutes.

Petitioner contends that if he is not allowed to bring a claim under 42 U.S.C. Section 1985, employers will be given a green light to intimidate and retaliate against their employees without fear of any legal recourse. Petitioner's implication is that Section 1985 is the only statute available to him. Without it, he has no remedy. However, such is not the case. There are already specific federal statutes available to protect at-will employees. A number of those are listed above in the preceding Sub-section E. In addition, federal criminal statutes such as 18 U.S.C. Section 1503 (Influencing or injuring officer or juror generally) already exist to deter employers from intimidating or retaliating against employees. Also, there are state laws and causes of action available to Petitioner such as Georgia's cause of action for tortious interference with a contract and the Georgia Racketeer Influenced and Corrupt Organizations Act (O.C.G.A. Section 16-14-6), both of which

Petitioner plead in his amended Complaint (J.A. 22 & 24).

II Petitioner Is Not a Proper Party to Raise a Claim under Section 1985(2).

Petitioner cites Portman v. County of Santa Clara, supra, from the Ninth Circuit, and Irizarry v. Quiros, supra, from the First Circuit, in support of his contention that Morast is wrongly decided. However, the Portman and Irizarry decisions are not helpful to Petitioner. Both these decisions involved injury to an underlying party in a federal proceeding. Petitioner was not a party in the underlying federal criminal case, he was only a witness. Section 1985(2) protects only parties to federal court proceedings.

Kush v. Rutledge, 460 U.S. 719 (1983), the seminal Section 1985(2) case, involved a party who alleged that his right to prevent an effective case in a federal proceeding had been injured by Defendants who had conspired to intimidate and threaten his witnesses.

The Ninth Circuit made the requirement of injury to a party in an underlying action absolutely clear in David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987). In David, the Section 1985(2) plaintiff claimed she had been discharged from employment because she acted as a witness in a separate federal court proceeding to which she had not been a party. The Court stated as follows:

> David has not alleged how she has been injured by her testimony in Parodi [the separate federal court proceeding] or her failure to appear in court. Allegations of witness intimidation under Section 1985(2) will not suffice for a cause of action unless it can be shown the litigant was hampered in being able to present an effective case. Id. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under Section 1985(2).

820 F.2d at 1040. (Emphasis in original).

The Seventh Circuit has adopted the same position. In

Rylewicz v. Beaton Service, Ltd., et al., 888 F.2d 1175, at 1180 (7th Cir. 1989), citing Rode v. Dellarciprete, 845 F.2d 1195, (3rd Cir. 1988) and David, supra, the Seventh Circuit held:

> ...remedial Sections 1985(3) and 1986 have been held to give monetary relief only to a "party" and not a mere witness such as Mr. Cummings.

But see Brewer v. Rockwell International Corp., 40 F.3d 1119, 1125 (10th Cir. 1994) for a contrary position.

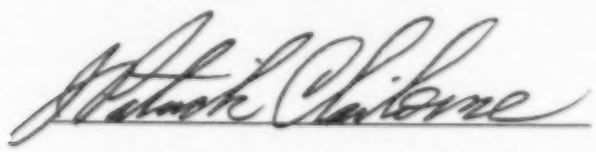
Petitioner was not a party to the underlying federal criminal case against Jeanette Garrison, HLM and Kelly upon which Petitioner bases his Section 1985(2) claim. Unlike the plaintiffs in Irizarry and Portman, Petitioner was only a witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was not injured. Only parties have standing under the First, Seventh, and Ninth Circuits' approach to the issue because it is the interest in being able to fully litigate a party's case in the

federal courts that constitutes the protected federal interest. Petitioner had no such federal interest implicated; therefore, it was proper to dismiss his Section 1985(2) claim.

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,



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No. 97-1472

In The

Supreme Court of the United States

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, Individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Does loss of "at will" employment give rise to compensable damage under 42 U.S.C. §1985(2)?

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PETITIONER'S REPLY BRIEF

This case concerns the damages recoverable for a violation of the right of a federal witness in a federal proceeding to be free from intimidation and retaliation. This Court granted certiorari to decide whether a witness who loses his at will employment because of his involvement in a federal proceeding is entitled to be compensated for the loss. This would not result in "converting the reconstruction-era civil rights acts into a general federal tort law" or "creating a new body of federal wrongful termination of employment remedies". A federal claim already exists for interference with a witness in a federal proceeding. This case concerns only whether such a witness' livelihood, if it exists at the will of his employer, is such an insubstantial interest as not to be protected by the statute.

Respondents argue that in the Fourteenth Amendment and in 42 U.S.C. §1981 and §1982 (derived from the Civil Rights Act of 1866), supplemented by judicial construction of 42 U.S.C. §1983, there exists a "substantial body of jurisprudence" establishing a uniform and invariable meaning for the word "property" as used in these enactments and in 42 U.S.C. §1985, a meaning which excludes at will employment from the category of property. They also assert that Congress' use of the words "depriving such person of employment or occupation" in the Enforcement Act of 1870, coupled with the use of more general language in §1985, shows an intent by Congress in the latter law to restrict it so as not to protect the interest of a worker in his employment, at will or otherwise. Such a reading disregards the different contexts in which the word "property" is used in these sections and

the historical relationship of these laws. It also ignores the substantial body of law which establishes that injuries such as those claimed by Petitioner Michael A. Haddle ("Haddle") are injuries to person or property.

1. Sections 1981 & 1982 (the Civil Rights Act of 1866)

Section 1981 has at least two parts, one concerned with the right "to make and enforce contracts" and one concerning "the full benefit and equal benefit of all laws and proceedings for the security of persons and property". Respondents argue that, since this Court has found that racial discrimination in employment comes under the "make and enforce contracts" portion of the statute, protection of employment cannot come under the "full benefit and equal benefit of all laws . . . for the security of persons and property" portion. They then infer that, since this phrase is similar to the phrase "injured in his person or property" as used in §1985, §1985 cannot have been intended to encompass rights in employment.

On the contrary, the use of the phrase "persons and property" in §1981 shows that when Congress used the phrase "injured in his person or property" in §1985 it intended an inclusive, global reach for this language and was not using the phrase in a restrictive sense. It is more natural to recognize that the phrase "persons and property" in §1981 was used to denote the full range of interests to be protected by existing state laws equally for black and white.

Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the only case Respondents cite to support a restrictive

meaning for this phrase in §1981 (and then only by implication) cannot be construed as they urge. *Patterson* did not hold, either expressly or by implication, that the phrase "persons and property" does not encompass rights in employment. It holds that on-the-job racial harassment "is not actionable under §1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." 491 U.S. at 180. Although Respondents surmise that this holding would have been unnecessary if "property" in the phrase "laws for the security of persons and property" included rights in employment, this in fact could not have been the case.

The plaintiff in *Patterson* did not claim that she was being denied the use of some state law which might have helped her in her claim of racial discrimination in employment. She made no claim that she was being denied the equal and full benefit of any law "for the security of persons or property". Her claim, and the Court's decision, involved only a construction of the phrase "make and enforce contracts". This Court in *Patterson* could not have avoided construction of the phrase "make and enforce contracts" by finding for the plaintiff under the "full benefit and equal benefit of all laws for the security of persons and property" language. Private racial discrimination would not involve a denial of the benefit of such laws. The plaintiff sought a federal remedy, not equal access to a state remedy. This Court held that she had a federal remedy, but only under Title VII of the Civil Rights Act of 1964, not under §1981. This Court's opinion says nothing, either expressly or by

implication, about the reach of the phrase "for the security of persons and property" or about the meaning of the word "property" in that phrase.

With respect to §1982, Respondents are simply wrong in citing five federal district court cases (only) for the proposition that "courts interpreting this provision of the reconstruction-era civil rights acts have not been willing to stretch the meaning of property so far as to encompass employment at will" (Respondents' Brief, p. 21). This is an overstatement of these decisions.

For example, the court in *Tate v. Hills-McCanna Co.*, 42 Fair Empl. Prac. Cas. (BNA) 138, 1982 WL 361 (N.D.Ill. June 16, 1982), rested its decision not on some invariable definition of "property" which supposedly governed the thinking of the Reconstruction era, but rather on the context of the word "property" in §1982 itself: "*Regardless of whether plaintiff had a property right in her continued employment,* that right is not the same as a real or personal property right within the meaning of §1982. While employment discrimination claims are not expressly excluded from §1982, the *wording of that provision* clearly limits its application to transactions in real and personal property, *such as leasing, selling and conveying such property.*" 1982 WL 361, *1 (emphasis supplied). *Abel v. Bonfanti*, 625 F.Supp. 263 (S.D.N.Y. 1985) says the same: "*Whatever property rights [the at will employee] may be able to establish regarding his alleged right to continued employment at [his employer]*, these rights are not those that can be inherited, purchased, leased, sold or conveyed, and, therefore, are not covered by §1982". 625 F.Supp. at 269 (emphasis supplied).

These cases are not premised on some definition of "property" to be mechanically applied to all Reconstruction-era enactments, but rather on the purpose and function of the word in its particular statutory context, the words which precede and condition it in the section itself. There is nothing in any of these five cases which even suggests that Congress, when it used the phrase "injured in his person or property" in §1985, had any thought of limiting the reach of the remedy it was providing.

The restrictions with which §1981 and §1982 have been hedged do not arise from the meaning of the words "property" or "persons and property" standing alone. In each case the interpretation of these words has depended on their context, and in particular on the surrounding words in the statutes. They say nothing about Congress' intention when, five years later, it used the expression "injured in his person or property" when creating a private claim for damages in what is now §1985.

This Court in *Patterson* quoted from its decision in *Georgia v. Rachel*, 384 U.S. 780 (1966), to emphasize the limited nature of the 1866 Act, from which both §1981 and §1982 derive: "The legislative history of the 1866 Act clearly indicates that Congress intended to protect only a limited category of rights." 491 U.S. at 176.

In the 1866 Act, Congress moved somewhat hesitantly, as the legislative history abundantly demonstrates, in the exercise of its new Fourteenth Amendment powers, to attempt to ensure that all state laws "for the security of persons and property" were available to blacks and whites alike.

Five years later, with the 1871 Act, Congress essayed a broader attack on the problem in the Southern states, involving the creation of new federal civil remedies. Its use of the phrase "injured in his person or property" in this new context should not be limited by its use of a different phrase in an earlier and quite different context.

2. The Enforcement Act of 1870

Respondents ask the Court to believe that Congress, in proscribing interference with federal court proceedings in the Civil Rights Act of 1871, intentionally employed more restrictive language in describing the reach of the statute than it did in the Civil Rights Act of 1870 (the Enforcement Act), proscribing interference with the right to vote. This argument is based entirely on the fact that in the earlier of the two acts Congress referred specifically to depriving a person of employment or occupation *sub eo nomine*. This reverses the historical relationship between these two laws.

The Civil Rights Act of 1871 was not passed because its predecessors, the Civil Rights Act of 1866, the Enforcement Act of 1870 and the Force Act of 1871, had been found to amount to statutory overkill. On the contrary, the 1871 Act evidences the conviction of Congress that these earlier measures were not sufficient to deal with the problems affecting the Southern states. It would be a strange canon of construction, in interpreting a series of measures addressed to a single over-arching problem, each more pervasive and drastic than its predecessor, to assume that limitations in the earlier enactments are to be read into the later, or that more general language in the

later is to be read as excluding misconduct more specifically described in the earlier.

Just as it makes no specific mention of "threats of depriving such person of employment or occupation", so §1985 likewise makes no mention of "threats of ejecting such person from rented house, lands, or other property" and other specific matters enumerated in the Enforcement Act. This does not mean that Congress did not intend to include all such injuries within the term "injured in his person or property" in §1985.

3. The Fourteenth Amendment, §1983 and §1985

The assertion that construction of the Fourteenth Amendment is a sure guide to construction of §1985 ignores the seminal case for modern §1985 jurisprudence, *Griffin v. Breckenridge*, 403 U.S. 88 (1971). This Court in *Griffin*, in establishing that "state action" is not required to constitute an actionable conspiracy under §1985, enunciated the principle later summarized in *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825 (1983), that, considering that "the section does not expressly refer to the Fourteenth Amendment", it is not "limited by the constraints of the Fourteenth Amendment." 463 U.S. at 832.

Logic does not support the theory that "injury to person or property", for which damages are available under §1985(2), must be no more extensive than "property" which the State may not take without due process

of law within the meaning of the Fourteenth Amendment.[1] In the context of at will employment, a suit under §1983, attempting to enforce the Fourteenth Amendment, *where no distinctly federal right* (such as the First Amendment) is involved, will always be a suit for procedural due process against a government employer. Any property interests the employee has in this situation will be statutory or quasi-statutory, arising from the employer itself, which is free to define the contours of the employment rights it grants as employer. *Cf. Arnett v. Kennedy*, 416 U.S. 134 (1974).

On the other hand, when a federally protected right is involved, regardless of whether that right exists by virtue of the Constitution as applied to the states through the Fourteenth Amendment, or is created by Congress to vindicate uniquely federal interests (such as the right to give evidence in a federal court without fear or retaliation), what is in question is not procedural due process at all. The purpose of the phrase "injured in his person or property", as used in §1985, has nothing to do with the procedural due process which must be accorded in a state deprivation of property. The phrase has to do with the specification of damages. When federal law defines an offense and prescribes a remedy to anyone "injured in his person or property" by its breach, "the rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is

[1] Respondents completely ignore the fact that Haddle's injury can be characterized as one to "person" as well as one to "property". See Haddle's Brief on the Merits, p.21, and the Brief of the United States as Amicus Curiae, p. 19 and footnote 18.

impaired." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1989). Herein lies the relevance of *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), cited in Haddle's Brief on the Merits. The phrase "injured in his person or property" should be illuminated by other uses of this phrase in the context of specifying damages, such as in the Clayton Act.

Here the only question to be addressed is whether a certain loss constitutes compensable damages under the statute. None of the cases Respondents cite actually holds that the word "property" does not encompass an employee's right in his at will employment, much less that loss of wages as a result of wrongful termination of employment is not an injury to person or property.

Although in its jurisprudence construing §1983 this Court has often spoken of "property interests", it has never lost sight of the fact that it is defining such interests for a particular purpose, such as procedural due process. *Roth v. Board of Regents*, 408 U.S. 564 (1972), is a good example:

> The requirements of *procedural due process* apply to *the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property*. When *protected* interests are implicated, the right to some kind of prior hearing is paramount. But the range of *interests protected by due process* is not infinite.
>
> 408 U.S. at 569-570
> (emphasis supplied).

Even as it discusses the nature of property, the Court is careful to delineate the question it is actually deciding, which is, in procedural due process cases like *Roth*,

whether the plaintiff possesses an interest protectable under the Fourteenth Amendment, not, as in the case now before the Court, whether and to what extent a plaintiff has been "injured in his person or property".

This distinction is well-illustrated in First Amendment cases such as *Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. 274 (1979). In that case the Court had no trouble agreeing that, even though the plaintiff's employment was at will, so that he was not entitled to procedural due process in connection with his dismissal, nevertheless if he was terminated for a federally proscribed reason, he suffered monetary damages from loss of his salary. 429 U.S. at 277.

The idea that the phrase "injured in his person or property" is to be given a restrictive meaning in §1985 is at odds with the use made of the statute to date. In *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341 (CA 3 1986), *affirmed on other grounds*, 483 U.S. 143 (1987), for instance, the court, rejecting a "crabbed and unwarranted" interpretation of what would constitute damage to a litigant arising from intimidation of witnesses, found that "delays, expenses, inconvenience, and the suppression of evidence during the pretrial phase" of a case would be cognizable damage. 792 F.2d at 355.

A litigant in a federal proceeding is given a remedy under §1985(2). Yet a litigant, no less than a witness, must be "injured in his person or property" in order to recover under the statute. Respondents would confine "person or property" as used in the statute to either (a) physical injury or (b) injury to property defined restrictively to apply only to indefeasible interests "which in no way

depend on another man's courtesy". Under such an argument it would hardly be possible for a litigant to be injured by a conspiracy to intimidate his witnesses. It is surely unlikely that the litigant, as opposed to the witnesses, will be physically injured by such a conspiracy. Just as clearly, the hampering of a litigant's case, which has repeatedly been held to be the kind of injury to a litigant for which the statute gives relief, can hardly be classed as an injury to property in Respondents' restrictive sense. A case in which a litigant is deprived of the testimony of a witness, because of intimidation of the witness, would not be a case of injury to the person or property of the litigant under Respondents' proposed test. Surely the loss of testimony is no more substantial an injury than loss of livelihood. On this view, the statute would fail of one of its clearest purposes. It would be a rare case indeed in which a conspiracy to intimidate witnesses resulted in an injury to a litigant's person or property as defined by Respondents.

4. Contemporary understanding of employment rights and at will employment

Respondents place great stress on the case of *Adair v. United States*, 208 U.S. 161 (1908), asserting that it represents the state of the law all during the 19th century. *Adair*, however, even the very passage quoted by Respondents, strongly supports Haddle.

The issue in *Adair* was whether Congress could pass a law preventing an employer from discharging employees because they refused to join a labor union. The Court found that such a law deprived the employer of his

right to contract with whom he would for services. The Court described this as both a personal and a property right: the "right – and that right inhered in his personal liberty, was also a right of property". 208 U.S. at 172. The Court buttressed this conclusion with the following quotation from Cooley on Torts:

> *It is a part of every man's civil rights* that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. *It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress.*
>
> 208 U.S. at 173
> (emphasis supplied).

The present case is not about the right of an employer to discharge his at will employee. Some future case before this Court may involve that right, but in this case the persons charged with conspiracy are not Haddle's employer. Respondents' theory is simply that, because the employer could discharge the employee at will, the employee has no damages if third persons conspire to deprive him of his employment. This assertion is conclusively refuted by the very quotation from *Adair*, quoting Cooley, which Respondents adduce purportedly in their support. Mr. Cooley states as plainly as can be that an individual has the right to have business relations with whom he pleases, and if he is wrongfully deprived of that right by a third party, he is entitled to redress. Further, interference with this right can be tortious even

when the right arises only from an at will employment relationship. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 251-252 (1917), quoting *Truax v. Reich*, 239 U.S. 33 (1915).

This is the background against which the provisions of §1985(2) were enacted. Nothing can be plainer than that at common law one deprived of his employment, at will or otherwise, by third persons was injured in his person or property. This is the clear and indeed inescapable implication of the language of this Court used in *Adair*, as well as being the express purport of this Court's language in *Truax v. Reich*, 239 U.S. 33 (1915), as quoted in Haddle's Brief on the Merits.

"Invasion of the right to earn a livelihood free from undue influence or molestation is an actionable infringement of a property right, even if no existing contract relation is disturbed." 45 Am.Jur.2d, "Interference", §51. "[T]he right to pursue a lawful occupation is a property right, and the wrongful interference therewith is an actionable wrong." *International Union v. Russell*, 264 Ala. 456, 88 So.2d 175 (Ala. 1956), *affirmed*, 356 U.S. 634 (1958), *reh. den.*, 357 U.S. 944 (1958).[2]

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[2] The authorities cited by Respondents for a contrary conclusion have absolutely nothing to do with at will employment or interference with employment. For example, *Jackson v. Housel*, 17 Johns. 280 (N.Y. Sup. Ct. 1820), upon which Respondents rely for their restrictive definition of property, is actually a will case in which the court found that a reference to "my property" bequeathed an entire fee rather than just a trust interest. The court was concerned to demonstrate the breadth of the term, not some restriction on it. There was no consideration of whether an interest, even if defeasible in some way, is

In the very year of passage of the Civil Rights Act of 1871, the Supreme Judicial Court of Massachusetts, in a careful opinion, found that interference with at will employment is the tortious invasion of a property right, redressable in damages. *Walker v. Cronin*, 107 Mass. 555 (1871). See especially pp. 563-564. Finding that a "malicious act . . . done to a man's occupation, profession, or way of getting a livelihood" is an injury "in respect of his property", for which "an action lies in all cases", the court allowed such an action to a manufacturer for interference with his workmen, even those who were not bound to him by contract. The principle would surely also work in reverse, to give a parallel right to the workman, as this Court recognized in *Truax, supra*.

5. Adequacy of other remedies

Respondents' arguments that Haddle had other adequate remedies at state law and that federal criminal law is a sufficient deterrent to witness tampering are beside the point. This Court has often found that, except in cases of irreconcilable conflict, the passage of a more specific civil rights measure in the modern era does not impliedly repeal the provisions of the Reconstruction era statutes. *Runyon v. McCrary*, 427 U.S. 160, 173, footnote 10 (1976). *Johnson v. Railway Express Agency*, 421 U.S. 454, 457-461 (1975). *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237-238 (1969). A fortiori, the fact that Congress has provided in the False Claims Act for an action by an

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nevertheless property protectable against third person. Similarly, *Reed v. Inhabitants of Belfast*, 20 Me. 246 (1841), simply has nothing to do with the issue presented here.

employee *against his employer* (in Haddle's case, a bankrupt at the relevant time) for retaliation should not work a repeal of §1985's right of action against third parties for conspiring to retaliate. Moreover, it would be a strange canon of construction indeed which considered that the existence of a criminal remedy should foreclose a civil rights action by the injured party.

6. Alternative Bases

Respondents argue that only litigants in federal proceedings, not witnesses, can have standing under §1985(2). For this curious and counter-intuitive interpretation, Respondents can cite only *David v. United States*, 820 F.2d 1038 (9th Cir. 1987).[3] Other cases referenced by Respondents actually relate to the standing of a *party* to federal proceedings.[4]

The Ninth Circuit in *David* cited no authority for its view that a witness who is injured by a conspiracy to intimidate witnesses or retaliate against them has no standing and has suffered no cognizable injury under §1985(2). 820 F.2d at 1040. The Seventh Circuit in *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1178 (7th Cir. 1989), following *David*, attempted to construct a reasoned basis for eliminating standing for witnesses under §1985(2),

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[3] As the United States has pointed out in its Brief as Amicus Curiae, p. 29, fn.1, this contention is not fairly included in the question presented by the petition for certiorari and was not addressed by the District Court or the Court of Appeals.

[4] *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988), cited by Respondents, involved a claimant who was neither a litigant nor a witness in a federal proceeding.

even though this was unnecessary for the result in the case, by referring to the use of the word "party" in the remedial final portion of §1985 ("the party so injured or deprived"), arguing that the word has a restrictive meaning at this point in the statute, excluding witnesses.

This theory is refuted by the legislative history of the 1871 Act. The word "party" appears three times in §1985, twice in subsection (2) and once at the end, where it is the source of the argument regarding lack of standing in a witness. This last use was not in the Act as passed in 1871, which used the word "person" instead. The substitution of "party" for "person" was added by the compilers of the Revised Statutes later in the century with no intent to change the substance of the provision. See Brief of the United States as Amicus Curiae, pp. 29-30, footnote 27, and p. 7, footnote 2. The first two uses of the word "party", in subsection (2) where it appears in the phrase "party or witness", were added at the time of original passage, specifically to make it clear that the statute was intended to protect witnesses *and* litigants. Senator Edmunds, a manager of the bill in the Senate, explained the purpose of the addition in language that incidentally leaves no doubt of the intention of Congress to protect witnesses with a civil damage remedy. *Congressional Globe*, 42nd Congress, 1st Sess., Pt. I, p. 567 (beginning with "so when you go to the bottom of the same page" and continuing through "for he would be dead and gone.").

Respondents' second proposed alternative basis, the argument that liability under §1985(2) requires "force, intimidation or threat", and that firing a man for testifying in federal court is neither, is likewise not properly

before the Court, not having been the basis for the decision below and not being fairly within the question presented on certiorari. In any event, it contradicts the plain wording of the statute, which reads in pertinent part as follows:

> If two or more persons in any State or territory conspire to deter, by force, intimidation, or threat, any party or witness . . . from attending court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . .
>
> 42 U.S.C. §1985(2)

This language speaks of two sorts of conspiracies: (1) those "to deter" from "attending" or "testifying" and (2) those "to injure" . . . "on account of . . . having . . . attended or testified." Grammar alone shows that the phrase "by force, intimidation or threat" modifies only conspiracies "to deter", not those "to injure on account of having attended or testified." While admittedly grammar cannot be a conclusive guide to the meaning of a statute, where there is other evidence to suggest its purpose or where if construed grammatically the statute would fail of its purpose, surely grammar should not be disregarded in construing a highly remedial statute such as this, when to do so would narrow its scope for no discernible purpose and would not advance any concern of the law.[5]

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[5] Finding nothing in the text of §1985(2) to justify a restrictive interpretation, Respondents resort to the dissent of Judge Meskill in *Keating v. Carey*, 706 F.2d 377, 392 (CA 2 1983),

Further, Haddle alleged not only that his firing was in retaliation for his attending the grand jury proceedings and being prepared to testify at trial, but also that it was intended to "intimidate" him and others from testifying at trial. J.A. 21 (para. 18 & 19) His case should not be dismissed on a Rule 12(b)(6) motion for failure to allege intimidation. There is no reason in the text of the statute or in fact why "intimidation" should require either force or verbal threat. See Brief of United States as Amicus Curiae, pp. 24-28.

7. State Law

Respondents argue at considerable length, what Haddle does not deny for the purposes of this case, that he has no claim for wrongful termination under Georgia law against his employer. The relevance of this fact is difficult to see. First, Haddle is not trying to proceed under Georgia law. Second, Haddle is not trying to proceed against his employer. If Georgia law is to be consulted at all, surely in the context of this case it should be

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where Judge Meskill argues forcefully, but without any supporting precedent whatsoever, that the reach of §1985 should be severely restricted. He writes that "[a]lthough noble in purpose, the objective of the 1871 Act was limited, to protect blacks and black sympathizers from rampant vigilantism in the South and to ensure these oppressed groups access to the courts and polling places" (706 F.2d at 390) and further that he takes a "narrow, historical view of §1985". *Id.* at 392. This approach to the interpretation of §1985 (and other Reconstruction provisions) not only disregards the plain text but is also the polar opposite of that taken by this Court in all of its recent jurisprudence and appears to be a throwback to the judicial policy of the last century.

consulted only to determine whether someone in Haddle's position has a "property right" in his employment under Georgia law, protectable against anybody. Here, the answer is yes by express holding of Georgia courts. *Troy v. Interfinancial, Inc.*, 171 Ga. App. 763, 766 320 S.E.2d 872, 877 (1984), *cert. denied.*

CONCLUSION

As part of the Civil Rights Act of 1871, Congress has given a damage remedy to a person who is "injured in his person or property" by a conspiracy to intimidate or retaliate against him on account of his having attended or testified in a federal court proceeding. §1985, like §1983, manifestly creates "a species of tort liability", as to which recoverable damages are "ordinarily determined according to principles derived from the common law of torts". *Carey v. Piphus*, 435 U.S. 247, 253, 257-258 (1978) (as to §1983). In the era when the Act was passed, it was well-recognized in the law that the right of every person "to make use of his labor on his own behalf, or to hire it out in the service of others" was "one of the first and foremost of civil rights." T. M. Cooley, *Treatise on the Law of Torts* (1880), p. 276. The law recognized, moreoever, then as now, that an at will employee, although he might be discharged at common law by his employer without liability, nevertheless possessed a valuable right in his employment which could not be interfered with by a third person with impunity. Legislating against this background, Congress had no reason to and did not exclude from its remedial purpose the protection of the livelihood of an at will laborer.

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed, and the case remanded with instructions to reinstate the complaint.

Respectfully submitted,

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No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON; DENNIS KELLY; G. PETER MOLLOY JR.; HEALTHMASTER, INC.; CHRISTOPHER GARRISON, individually and as Trustee for certain trusts; and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS JEANETTE G. GARRISON; HLM, INC. (F/K/A HEALTHMASTER, INC.); AND CHRISTOPHER GARRISON

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6 pp

Pursuant to Rule 25.5 of the Rules of the Supreme Court of the United States, Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison file this supplemental brief to bring to the Court's attention a decision of the Court of Appeals of the State of Georgia issued subsequent to the filing of the briefs in this case. In *Robins Fed. Credit Union v. Brand*, No. A98A1445, 1998 WL 637153 (Ga. App. Sept. 17, 1998), *petition for cert. filed* (Ga. Oct. 13, 1998) (No. S99C0119)[1], the Georgia Court of Appeals directly addressed the issue of whether or when, under Georgia law, an employee has a property interest in his or her employment. A core issue in this case is whether Petitioner Michael A. Haddle had a property interest in his at will employment and, therefore, stated a claim for damages under 42 U.S.C. § 1985(2).

The plaintiffs in *Robins Fed. Credit Union* were employees of a credit union created and operated under the Federal Credit Union Act, 12 U.S.C. § 1751, *et seq*. The plaintiffs brought state law actions for wrongful termination and tortious interference contending that they were afforded protection against discharge under Georgia law because, as employees of a federal credit union, they were public employees. The Court of Appeals first restated the limited "public employee" exception to at will employment:

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[1] The *Robins Fed. Credit Union* decision is reprinted in full in the appendix to this brief. The decision first was published on November 4, 1998, in the *Fulton County Daily Report*.

> Under Georgia law, a public employee has a property right interest in his or her job whenever the employee may be dismissed only for cause. This is a recognized "public employees" exception to the at will statute, OCGA § 34-7-1.

Id. at *1 (citation omitted).

The Court of Appeals then went on to find that the "public employee" exception did not apply:

> However, as federal credit unions are not federal agencies, employees of federal credit unions are not public employees within the meaning of OCGA § 34-7-1, and no exception to this statute exists to which the credit union employees can claim benefit.

Id.

The Court of Appeals also stated:

> Judicially created exceptions to OCGA § 34-7-1 or any other statute are not favored under Georgia law. This principle applies even when termination of employment is alleged to have been in retaliation for legitimate employee conduct.

Id. at *2.

The Court of Appeals rejected the plaintiffs' argument that the Federal Credit Union Act created a "property right" in their employment. Noting that this Court held in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) that property interests are not created by the Constitution but, instead, must be found from "'an independent source such as state law'" *Id.* (quoting *Loudermill*, 470 U.S. at 538), the Court of Appeals concluded:

> If state law determines whether a public employee has a property interest in his or her employment, it also will determine whether a *private sector employee has a property interest.* Under existing Georgia law, there is no public policy exception to OCGA § 34-7-1 in favor of the credit union employees.

Id. (emphasis added).

The Court of Appeals in *Robins Fed. Credit Union* made clear that, without exception, private, at will employees under Georgia law have no property interest in their employment.

This holding is in substance a restatement of Georgia law established over 100 years ago. *See Mondon v. Western Union Tel. Co.*, 23 S.E. 853, 855 (Ga. 1895)

(contract for one month could be terminated at will by employee or employee after expiration of month); *Odum v. Bush*, 53 S.E. 1013, 1016 (Ga. 1906) ("[T]he hiring . . . being indefinite as to its duration, may be terminated at the will of either party."). *See also*, Georgia Civil Code 1895 § 2614, now codified as O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party.").

Petitioner is not a public employee who may be dismissed only for cause. Absent being such an employee, Petitioner is under Georgia law an at will employee with no property interest in his employment. Petitioner has not suffered an injury to person or property and does not state a claim under 42 U.S.C. § 1985.

Respectfully submitted,

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November 9, 1998

APPENDIX

Robins Fed. Credit Union v. Brand A98A1445, 1998 WL 637153 (Ga. App. Sept. 17, 1998), *petition for cert. filed* (Ga. Oct. 13, 1998) (No. S99C0119)

JOHNSON, Presiding Judge.

***1** Following the grant of their application for interlocutory review, Robins Federal Credit Union and Edward Levins (the credit union) appeal a state court order denying their second motion for summary judgment. The credit union is a federal credit union chartered pursuant to the Federal Credit Union Act, 12 USC § 1751.

This suit arises from claims of wrongful termination, tortious interference with shareholder rights, and breach of fiduciary duty. The credit union and Levins removed the action to federal court. However, the United States District Court granted a motion to remand brought by appellee credit union employees, D. Ronnie Brand, Peggy Correia, Harry Moore and Duncan Smith. The District Court held that the employees had no right of action under the Federal Credit Union Act, 12 USC § 1751 et seq., and that upon remand, the state court would be limited to a consideration of the employees' right to relief under Georgia law. *Brand v. Robins Federal Credit Union*, 969 F. Supp. 778, 780(6, 7) (M.D. Ga. 1997).

The issue in the present case is whether the credit union employees were terminable at will or are afforded protection against discharge under Georgia law because they are employees of a federal agency. The trial court concluded inter alia that: (i) the credit union was an agency of the federal government and not a private employer, (ii) the credit union employees were quasi-government employees and had a vested property interest in their employment, and (iii) the credit union

employees could not be fired without cause (thereby impliedly recognizing a public policy exception for quasi-government employees to the "at will" statute, OGGA § 34-7-1). For reasons that follow, we reverse this ruling by the trial court.

1. Is the Robins Federal Credit Union a federal agency? After a thorough review of both Georgia and federal law, we conclude that it is not.

The term "federal credit union" means a cooperative association organized in accordance with Chapter 14, 12 USC § 1751 et seq., for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes. 12 USC § 1752(1). The control and management of a federal credit union is not vested in the federal government but in its membership and their duly elected board of directors. *Jesinger v. Nevada Federal Credit Union,* 24 F.3d 1127, 1132(4,5) (9th Cir. 1994). Although credit unions are subject to a unique amount of governmental control under the Federal Credit Union Act, they are not federal agencies. *See Id.*; *Cuenca v. Safeway etc., Federal Credit Union,* 188 Cal. App. 3d 985, 225 Cal. Rptr. 852, 857(8) (1986); *see also Northeast Federal Credit Union v. Neves,* 837 F.2d 531, 535 (4) (1st Cir. 1988); *cf. Morast v. Lance,* 807 F.2d 926, 929 (2,3) (11th Cir. 1987).

2. Under Georgia law, a public employee has a property right interest in his or her job whenever the employee may be dismissed only for cause. *Maxwell v. Mayor &c. Savannah,* 226 Ga. App. 705, 707 (1)(487 S.E.2d 478)(1997). This is a recognized "public employees" exception to the at will statute, OCGA § 34-7-1. However, as federal credit unions are not federal agencies, employees of federal credit unions are not public employees within the meaning of OCGA § 34-7-1, and

no exception to this statute exists to which the credit union employees can claim benefit. We cannot agree with the contention that there exists a class of "quasi-public employees" who should be included within the "public employee" exception to OCGA § 34-7-1.

***2** Judicially created exceptions to OCGA § 34-7-1 or any other statute are not favored under Georgia law. This principle applies even when termination of employment is alleged to have been in retaliation for legitimate employee conduct. For example, in *Evans v. Bibb Company,* 178 Ga. App. 139 (1) (342 S.E.2d 484)(1986), this court would not judicially create "a public policy exception to an employer's right to discharge an employee at will when the right is exercised in retaliation for the employee's assertion of his rights" under the Georgia Workers' Compensation Act. "The courts of this state have consistently held that they will not usurp the legislative function, and, under the rubric that they are the propounders of 'public policy,' undertake to create exceptions to the legal proposition that there can be no recovery in tort for the alleged 'wrongful' termination of the employment of an at-will employee . . . . Georgia courts have refused to acknowledge any exceptions not encompassed by OCGA § 34-7-1, and in the absence of any express statutory provision for such a civil remedy, we decline to create judicially such a remedy." (Citation and punctuation omitted.) *Jellico v. Effingham County,* 221 Ga. App. 252, 253, 471 S.E.2d 36 (1[illegible]); *accord Borden v. Johnson,* 196 Ga. App. 288, 289-290 (1[illegible], 395 S.E.2d 628 (1990); *Evans, supra.*

3. The credit union employees, principally relying upon a broad interpretation of *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 105 S. Ct. 1487, 84 L.E.2d 494 (1985), contend that they were vested with property rights in

their employment pursuant to various provisions of the Federal Credit Union Act and therefore have a right of action for wrongful termination under Georgia law. We disagree.

As determined in *Brand, supra*, the credit union employees had no express or implied private right of action under the Federal Credit Union Act. If the Federal Credit Union Act had created any form of property right in their employment, the employees' termination should have resulted in a cause of action arising under the Act.

Since the credit union was not a public agency and since the credit union employees were not public employees under Georgia law, the employees cannot claim a public employee exception to the employment at-will statute. Moreover, mere status as a public employee would not, standing alone, support the granting of a public policy exception. *Compare Maxwell, supra* at 707 (1), 487 S.E.2d 478, where a public employee was found to have a sufficient property right in his employment because he could only be terminated for good cause.

Loudermill, supra at 538, 105 S. Ct. 1487, held that property interests are not created by the Constitution but are created and their dimensions are defined "by existing rules and understandings that stem from an independent source such as state law." This holding is silent regarding whether a provision of the Federal Credit Union Act could constitute "an independent source" creating a property right in private sector employment which, although insufficient to give rise to an express or implied right of action under the Act, could give rise to a state cause of action for wrongful termination. However, in *Warren v. Crawford,* 927 F.2d 559, 562 (3) (11th Cir. 1991), it was held: "The Fourteenth Amendment protects against the government's deprivation of liberty or property without

procedural due process. [Cit.] *State law* determines whether a public employee has a property interest in his or her job. [Cit.]" (Emphasis supplied.) If state law determines whether a public employee has a property interest in his or her employment, it also will be determinative whether a private sector employee has a property interest. Under existing Georgia law, there is no public policy exception to OCGA § 34-7-1 in favor of the credit union employees. Finally, we note that *Loudermill,* relied upon by appellees, is distinguishable on its facts; *Loudermill* was classified as a civil servant under Ohio law and by state statute could only be terminated for cause.

**3 Judgment reversed.*

Smith, J., and Senior Appellate Judge Harold R. Banke concur.

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OCTOBER TERM, 1998

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v.

JEANETTE G. GARRISON, ET AL.

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an at-will employee who alleges that he was dismissed from his employment in furtherance of a conspiracy to retaliate against him for his appearance in federal court and to deter him and others from testifying in subsequent federal court proceedings states a valid claim for damages under the Civil Rights Act of 1871, 42 U.S.C. 1985(2) and (3).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether an at-will employee has a cause of action for damages under the Civil Rights Act of 1871, 42 U.S.C. 1985(2) and (3), when he is dismissed from his job pursuant to a conspiracy to deter him and others from appearing or testifying in federal court or to retaliate against him for so appearing or testifying. The United States often seeks the cooperation of employees in investigations and court proceedings relating to actions that may violate federal law. A decision clarifying the protection afforded by 42 U.S.C. 1985(2) to employees who cooperate in those investigations and proceedings will likely affect the ability of the United States to obtain such cooperation in the future.

STATEMENT

1. Petitioner Michael A. Haddle has alleged that he was employed by respondent Healthmaster, Inc. (Healthmaster), from 1986 to 1995. Amended Compl. ¶ 7. Respondents Jeanette G. Garrison, Dennis Kelley, and G. Peter Molloy have all served in various capacities as officers and directors of Healthmaster. *Id.* ¶ 10.

According to petitioner's complaint, on March 8, 1995, a federal grand jury returned a 133-count indictment charging Garrison, Kelly, and Healthmaster with fraud. Amended Compl. ¶ 12. Molloy was not named in the indictment. *Id.* ¶ 13. Petitioner cooperated with federal agents in the investigation that preceded the indictment. *Id.* ¶ 14. Petitioner also appeared to testify before the grand jury, pursuant to a subpoena, although his testimony was not presented. *Ibid.* Respondents were aware of petitioner's cooperation and were aware that he would likely be a witness at the criminal trial. *Id.* ¶¶ 16, 18.

Petitioner alleged that, as a result of the indictment, the operations of Healthmaster were transferred to its wholly owned subsidiary, Healthmaster Home Health Care, Inc. (HHHC), which was placed under the protection of the bankruptcy court. The bankruptcy court barred Garrison and Kelly from any participation in HHHC. Amended Compl. ¶¶ 8, 15. Molloy became the president, and petitioner became an employee, of HHHC. *Id.* ¶¶ 8, 16.

According to petitioner's complaint, after the indictment and the transfer of Healthmaster's operations, respondents Molloy, Garrison, and Kelly agreed to bring about petitioner's termination from his new position at HHHC. Amended Compl. ¶ 18. Respondents intended this termination as "retaliation against [petitioner] for his cooperation with federal agents and his testimony under subpoena to the federal grand jury." *Ibid.* In addition, respondents intended through petitioner's termination to

intimidate petitioner and other Healthmaster employees from cooperating with federal agents or testifying in any criminal matters involving respondents. *Ibid.* At the time they made the agreement, respondents Garrison and Kelly were not employees of HHHC. *Id.* ¶ 33. Pursuant to the conspiracy, and at the direction of respondents Garrison and Kelly, Molloy caused petitioner to be terminated from his position on June 21, 1995. *Id.* ¶ 16.

2. Petitioner brought suit in the United States District Court for the Southern District of Georgia, asserting a federal claim under 42 U.S.C. 1985 and various state law claims. Section 1985, in pertinent part, prohibits conspiracies either to deter, by force, threat, or intimidation, any party or witness from attending or testifying freely, fully, and truthfully in a federal court or to injure any party or witness in his person or property because he attended or testified in federal court. See 42 U.S.C. 1985(2) (clause i).[1] The statute provides a remedy in damages to anyone who is injured in his person or property or deprived of a federal right or privilege as a result of an act in furtherance of a conspiracy prohibited under any part of Section 1985, including clause one of Section 1985(2). See 42 U.S.C. 1985(3) (clause iii).

Petitioner alleged that his employment was terminated in furtherance of respondents' conspiracy to retaliate against him for cooperating in the federal investigation and testifying before the grand jury and to deter him and others from testifying in the criminal proceedings, in violation of Section 1985(2). Amended Compl. ¶¶ 18, 20.

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[1] Because Section 1985 is complex, and we refer frequently throughout this brief to specific clauses of the statute that are not numbered in the statute as codified, we have reproduced the statute in the appendix with roman numerals added to indicate the provisions that we refer to as separate clauses. See App., *infra*, 1a-2a.

Petitioner further alleged that he was "injured in his person and property" by respondents' actions. *Id.* ¶ 21.

Respondents moved to dismiss the suit for failure to state a claim upon which relief can be granted. See Pet. App. 3a-4a. The district court granted the motion on the authority of *Morast* v. *Lance*, 807 F.2d 926 (11th Cir. 1987). Pet. App. 5a-6a. In *Morast*, the Eleventh Circuit held that an at-will employee who is dismissed pursuant to a conspiracy proscribed by 42 U.S.C. 1985(2) has no cause of action. See 807 F.2d at 930. The *Morast* court explained its holding as follows:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because Morast was an at will employee, *see* 12 U.S.C. § 24 (Fifth); O.C.G.A. § 34-7-1 (1981), he had no *constitutionally protected* interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute.

807 F.2d at 930 (emphasis added). Because petitioner conceded that he was an at-will employee, the district court ruled that *Morast* required that his Section 1985 claim be dismissed. Pet. App. 4a-6a. The district court also dismissed petitioner's state claims. *Id.* at 6a.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed in a three-sentence opinion, holding that petitioner's arguments were foreclosed by *Morast*. Pet. App. 1a-2a. The court of appeals denied petitioner's suggestion for hearing en banc. *Id.* at 2a n.1.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that petitioner must have suffered an injury to a constitutionally protected interest to maintain an action under Section 1985(2) (clause i). The statute does not require injury to a federal

interest apart from the interest in the integrity of federal judicial proceedings that is protected by the first clause of Section 1985(2) itself. Requiring injury to an independent constitutional or other federal interest conflicts with the statute's plain language and has no support in its legislative history.

Section 1985(2) (clause i) protects the integrity of federal judicial proceedings by proscribing conspiracies to deter a witness from attending or testifying in federal court or to injure a witness in his person or property for having done so. Section 1985(3) (clause iii) provides a remedy in damages to anyone "injured in his person or property" or deprived of a federal right or privilege as the result of a conspiracy proscribed by Section 1985(2) (clause i).

Petitioner alleged sufficient injury to sustain an action under those provisions. A plaintiff is "injured in his person or property" if he has suffered loss or damage of a type compensable in a common law tort action. The loss need not involve bodily injury or destruction of tangible property. Damages resulting from termination of employment, such as lost earnings, fall within the ambit of the statute.

The fact that the terminated employment was "at will" does not disqualify the resulting injuries. Section 1985(2) (clause i) grants prospective witnesses a substantive federal right to be free of conspiracies to deter or retaliate against them for their attendance at federal court proceedings. Employees do not lose their right to be free of retaliation in violation of federal law because their employment is at will under state law. This Court generally avoids interpreting federal statutes in a way that makes federal rights depend on the vagaries of state law. That principle has particular force here, because Congress enacted Section 1985 based on a belief that state authorities were unwilling or unable to preserve civil order in the South during the Reconstruction.

Respondents attempt to limit the coverage of Section 1985(2) (clause i) to actions involving force or the threat of force, but that construction is not supported by either the statute's language or its legislative history and would undermine the statute's purpose. By its terms, the statute fixes clear limits on its reach and does not require any additional limitation by judicial implication.

ARGUMENT

The district court dismissed petitioner's complaint for failure to state a claim. A reviewing court must therefore assume that the allegations in the complaint are true and may affirm the dismissal only if petitioner clearly could prove no set of facts that would entitle him to relief. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993). In affirming the dismissal, the court of appeals held that termination of at-will employment may never cause an injury sufficient to support suit under Section 1985(2) (clause i). Pet. App. 2a. Because that conclusion rested on an erroneous interpretation of the statute, the judgment of the court of appeals must be reversed.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HAS NO CAUSE OF ACTION UNDER SECTION 1985(2) BECAUSE HE DID NOT ALLEGE INJURY TO A CONSTITUTIONALLY PROTECTED INTEREST

The first clause of Section 1985(2), under which petitioner brought his action, provides in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or

> property on account of his having so attended or testified * * * .

42 U.S.C. 1985(2) (clause i). That clause must be read in conjunction with the third and final clause of Section 1985(3), which provides the remedy:

> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1985(3) (clause iii).[2]

Nothing in the above language supports the holding of the court of appeals that petitioner's cause of action turns on whether he has suffered an injury to a constitutionally protected interest. Nor does the language provide any

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[2] The statutory provision codified as 42 U.S.C. 1985 was originally enacted as Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. As originally enacted, Section 2 contained only one long paragraph. In 1874, Section 2 was reclassified as part of the consolidation and collection of all federal statutes and laws in the Revised Statutes, 18 Stat. 347. Although minor changes were made to Section 2 to accommodate the classification, Congress did not intend to change its meaning. See *Kush* v. *Rutledge*, 460 U.S. 719, 724 (1983). Except for the changes made in the consolidation, Congress has never amended Section 1985. We have reprinted the statute as originally enacted in the appendix to this brief. See App., *infra*, 3a-5a.

In addition to the prohibition at issue here, Section 1985 also prohibits conspiracies to interfere with federal officers (Section 1985(1)), equal protection in state courts (Section 1985(2) (clause ii)), private enjoyment of equal protection of the laws (Section 1985(3) (clause i)), and advocacy in federal elections (Section 1985(3) (clause ii)).

support for respondents' variation on that holding (Resp. Garrison, et al. Br. in Opp. 10-12, 13-15)—that petitioner can only maintain an action if he can show injury to a federal right or interest independent of his right to be free from a conspiracy proscribed by the statute.

Section 1985(2) (clause i) protects the strong federal interest in the integrity of federal judicial proceedings by creating a substantive right to be free from conspiracies to interfere with federal witnesses, parties and jurors. See *Kush* v. *Rutledge*, 460 U.S. 719, 724 (1983) (the statute proscribes "conspiracies that interfere with * * * the administration of justice in federal courts"); *id.* at 726 (referring to a "violation" of "rights under the first clause of § 1985(2)"); *Irizarry* v. *Quiros*, 722 F.2d 869, 872 (1st Cir. 1983). The statute does not require that the prohibited conspiracies infringe any constitutional or federal right apart from the right to participate in federal judicial proceedings that is protected by the statute itself. Indeed, in describing the proscribed conspiracies, Section 1985(2) (clause i) does not use the terms "constitutional right," "federal right" or any similar language.

Section 1985(3) (clause iii), which specifies the remedy for conspiracies proscribed by Section 1985(2) (clause i), and for conspiracies proscribed by the other provisions of Section 1985, does refer to a "right or privilege of a citizen of the United States." However, that reference refutes, rather than supports, the contention that deprivation of a federal right is a necessary element of an action for damages under the statute.

The remedy clause authorizes a cause of action for damages if the plaintiff is *either* "injured in his person or property, *or* deprived of having and exercising any right or privilege of a citizen of the United States." 42 U.S.C. 1985(3) (clause iii) (emphasis added). The use of the disjunctive makes clear that the remedy provided by the statute is not limited to situations in which a plaintiff is deprived of a federal right or privilege. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) (terms connected by a disjunctive should generally be given separate meanings). The remedy also encompasses any situation in which the plaintiff is "injured in his person or property" by a conspiracy prohibited by Section 1985(2) (clause i). And, as explained above, neither those conspiracies nor the resulting injuries necessarily entail deprivation of an independent federal right.

The court of appeals may have been misled because other provisions of Section 1985 do limit their prohibitions to conspiracies involving deprivation of an independent federal right. Those provisions—which are not aimed at protecting federal courts, officers, or elections, and are not at issue in this case—prohibit conspiracies to deny persons the "equal protection of the laws" or "equal privileges and immunities under the laws."

For example, Section 1985(3) (clause i) provides a cause of action against two or more persons who "conspire or go in disguise on the highway or on the premises of another" for the purpose of depriving persons of "equal protection of the laws" or "equal privileges and immunities under the laws." This Court has held that the equal protection language in Section 1985(3) (clause i) imposes two limitations on claims brought under that provision. First, the plaintiff must prove that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lies] behind the conspirators' action." See *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993) (quoting *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971)). Second, the equal protection language makes clear that Section 1985(3) (clause i) creates no substantive rights. The plaintiff must identify elsewhere a right to which the conspiracy sought to deny equal access. See *United Bhd. of Carpenters & Joiners* v. *Scott*, 463 U.S. 825, 833 (1983); *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442

U.S. 366, 376 (1979). See also 42 U.S.C. 1985(2) (clause ii) (prohibiting conspiracies to deny equal protection by interfering with state courts).

The provisions of Section 1985 that prohibit conspiracies to interfere with federal courts, officers and elections, however, do not contain equal protection language. See *Kush*, 460 U.S. at 724-725. The absence of that language is not an accident. As the Court explained in *Kush*, the sponsors inserted the equal protection language into selected portions of the Civil Rights Act of 1871 (such as Section 1985(3) (clause i)) in order to address constitutional objections that the "enormous sweep of the original language" improperly extended federal authority and displaced state control over private conduct. See *Kush*, 460 U.S. at 726 (quoting *Griffin*, 403 U.S. at 99-100); see also Cong. Globe, 42d Cong., 1st Sess. H. 477 (1871) (Rep. Shellabarger); *id.* at H. 485 (Rep. Cook). Congress included equal protection language to make clear that private conduct that did not directly threaten federal interests would be proscribed only when it was aimed at rights that were otherwise protected by federal law.

The legislative concern that motivated the limitation on Section 1985(3) (clause i) does not apply to the portions of Section 1985 that prohibit interference with federal courts, officers and elections. *Kush*, 460 U.S. at 726. Neither opponents nor proponents of the bill questioned Congress's authority to prohibit interference with witnesses, parties and jurors in the federal courts. See *Kush*, 460 U.S. at 727 (citing Cong. Globe, 42d Cong., 1st Sess. H. 486 (1871) (Rep. Cook); *id.* at S. app. 220 (Sen. Thurman)). That interference necessarily implicates federal interests, and the limiting language was therefore deemed unnecessary. See *Kush*, 460 U.S. at 725; see also *McCord* v. *Bailey*, 636 F.2d 606, 616 (D.C. Cir. 1980) (Section 1985 requires "violations of an explicit federal interest" for "obstruction of justice in state courts," but, for "acts

interfering with the operation of federal courts, no limitation was made"), cert. denied, 451 U.S. 983 (1981).

In requiring that the plaintiff show an injury to a separate constitutional interest in his employment, the Eleventh Circuit improperly imported the requirements of Section 1985(3) (clause i) into Section 1985(2) (clause i) and ignored important differences in the language and purposes of the two provisions. This Court rejected that approach in *Kush*, *supra*. In that case, the Court held that the district court improperly required a plaintiff suing under Section 1985(2) (clause i) to prove that the conduct he challenged was motivated by racial or other class-based animus, proof that would have been required in a suit under Section 1985(3) (clause i). The Court explained that the textual basis for the race or class-based animus requirement—the equal protection language in Section 1985(3) (clause i)—does not appear in Section 1985(2) (clause i). *Kush*, 460 U.S. at 724-725. The reasoning in *Kush* applies with equal force here.

II. PETITIONER ALLEGED SUFFICIENT INJURY TO MAINTAIN AN ACTION UNDER SECTION 1985(2) BY ALLEGING THAT HE WAS "INJURED IN HIS PERSON OR PROPERTY" BY THE TERMINATION OF HIS EMPLOYMENT

Petitioner's allegation that he was "injured in his person or property" by the termination of his employment in furtherance of a conspiracy proscribed by Section 1985(2) (clause i) is sufficient to support his cause of action. A plaintiff is "injured in person or property" within the meaning of the statute if he suffers any loss or damage of a type compensable in a tort suit at common law. Damages such as lost earnings that result from termination of employment fall clearly within the ambit of the statute. The fact that the terminated employment was "at will" does

not disqualify the resulting harm from being an "injur[y] in person or property."

A. A Plaintiff Is Injured In His Person Or Property If He Suffers Loss Or Damage Of A Type Compensable In Tort

The statute provides a remedy in damages to anyone who has been "injured in his person or property" as a result of an act in furtherance of a conspiracy proscribed by Section 1985(2) (clause i). As several courts of appeals have recognized, the requirement of "injury" to "person or property" demands only that a plaintiff have suffered some loss or damage of the type compensable in a tort suit at common law. See *Irizarry*, 722 F.2d at 871 (term "property" in Section 1985 "must include any economic damage that would be recognized in an ordinary tort suit"); accord *Portman* v. *County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993).

At the time Congress enacted the Civil Rights Act of 1871, the term "injured" had much the same meaning that it has today: harmed, hurt, or damaged in any way. A leading dictionary of the day offered the following definitions: "To do harm to; to impair the excellence and value of; to hurt; to damage." N. Webster, *An American Dictionary of the English Language* 694 (rev. ed. 1870).[3] That dictionary went on to explain that "injure" was "used in a variety of senses," including:

> (a.) To hurt or wound, as the person; to impair soundness, as of health. (b.) To damage or lessen the value of, as goods or estate. (c.) To slander, tarnish, or impair, as reputation or character. (d.) To impair or diminish, as happiness. (e.) To give pain to, as the sensibilities or the feelings; to grieve; to annoy. (f.) To impair, as the intellect or mind.

[3] Similarly, today "injure" is broadly defined as "to do or cause harm or any kind to; damage; hurt; impair." *Random House Dictionary of the English Language* 983 (2d ed. 1987 unabridged). The dictionary adds that "INJURE is a general term referring to any kind or degree of damage." *Ibid*.

Ibid. The first edition of Black's Law Dictionary also broadly defined injury as "[a]ny wrong or damage done to another." *Black's Law Dictionary* (1st ed. 1891).[4]

[4] The term "injury" has also sometimes been used to signify damage caused by the violation of a legal right. See, *e.g.*, 1 B.V. Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 612 (1879); A. M. Burrill, *A Law Dictionary and Glossary* 79 (2d ed. 1867). It is unlikely, however, that Congress used the word "injured" in the remedy clause of Section 1985 to require not only actual harm or damage but also the violation of a right under state or federal law separate and apart from the right protected by Section 1985(2) (clause i) itself. First, the remedy clause becomes relevant only after a plaintiff establishes violation of a right provided in one of the substantive clauses of Section 1985. Requiring an additional violation would be redundant. Second, as discussed at p. 23, *infra*, the historical context in which Congress enacted Section 1985 suggests that Congress did not intend the remedy for violations of the statute to depend on state law.

Moreover, it is a fundamental canon of statutory interpretation that words should be given their ordinary, contemporary, common meaning. See, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The legal dictionaries of the late nineteenth century recognized that "[i]n ordinary language," injury "means any loss." Abbott, *supra*; see also Burrill, *supra* ("In ordinary language, this word has effectually usurped the meaning of *damnum*, (damage.)"). Both legal dictionaries and courts of the time commonly used "injury" to signify a harm that might or might not violate a legal right or give rise to a remedy. See, *e.g.*, 1 J. Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 636 (11th ed. 1862) ("There are many injuries for which the law affords no remedy."); *Sanderson* v. *Hunt*, 76 S.W. 179 (Ky. 1903) ("An injury to one's person may be done in a number of ways. For example, it may be done to some member of his body, it may be to his state or peace of mind * * * . The law may not allow a recovery for all such injuries.").

The statute also requires that the harm or damage a plaintiff suffers be "in his person or property." At the time that Section 1985 was enacted, that phrase broadly encompassed all harms compensable in a tort suit. Blackstone used the phrase to distinguish actions in tort from actions in contract:

> Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs.
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> Of the former nature are all actions upon debts or promises; of the latter are all actions for trespasses, nuisances, assaults, defamatory words, and the like.

4 *Blackstone's Commentaries* 117 (Tucker ed. 1803). Blackstone distinguished generally between rights of person and rights of property, which he referred to as "rights of things." The former are rights that the individual obtains by virtue of his personhood. The latter are rights that the individual obtains through his possession or ownership of property. See *id.*, Vol. 2, at 122; *id.*, Vol. 3, at 1. As the Georgia Supreme Court noted in summarizing the classifications used by Blackstone and others:

> At common law, absolute personal rights were divided into personal security, personal liberty, and private property.
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> * * * * *
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> No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other.

Johnson v. *Bradstreet Co.*, 13 S.E. 250 (Ga. 1891); accord *Hoover* v. *Palmer*, 80 N.C. 313, 314 (1879); *Thompson* v. *Judy*, 169 F. 553, 555-556 (6th Cir. 1909). See also 1 J. Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 636 (11th ed. 1862) (noting that legal injuries can be divided into injuries to person and injuries to personal and real property); Md. Const. of 1867, Art. 19, Declaration of Rights (dividing injuries for which the law ought to provide a remedy into injuries to "person" and "property"). In essence, every type of damage for which the courts may provide compensation in a tort suit may be classified as an injury either to a person or to his property.

B. Injury In Person Or Property Is Not Limited To Bodily Injury and Damage to Tangible Property

Respondents' suggestion (Resp. Garrison, et al. Br. in Opp. 18-19) that "injur[y] in person or property" embraces only bodily injuries or destruction of tangible property is untenable. Respondents' argument is contradicted by numerous court decisions confirming that "injuries to the person" encompass non-physical harms and "injuries to property" include various monetary losses. Moreover, the construction of the phrase proposed by respondents would frustrate the purpose of the statute.

1. Courts in the nineteenth and early twentieth century routinely ruled that tort actions complaining of adultery,[5] seduction of a minor,[6] alienation of spousal affec-

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[5] See, *e.g.*, *Tinker* v. *Colwell*, 193 U.S. 473 (1904); *Garrison* v. *Burden*, 40 Ala. 513, 515-516 (1867).

[6] See, *e.g.*, *Hoover* v. *Palmer*, 80 N.C. at 314-315; *In re Freche*, 109 F. 620, 620-621 (D. N.J. 1901); *In re Maples*, 105 F. 919 (D. Montana 1901).

tions,[7] breach of promise of marriage,[8] defamation,[9] malicious prosecution[10] and legal malpractice[11] should be considered actions for "injuries to the person," even though they involved no bodily injury.[12] Those courts reasoned that injuries such as mental anguish, injury to reputation, and other intangible harms are properly classed as injuries to the person. See, *e.g.*, *McDonald* v. *Brown*, 51 A. 213, 214 (R.I. 1902); *Wade* v. *Kalbfleish*, 58 N.Y. 282, 285 (1874).[13]

Similarly, "injury to property" has long been construed to include monetary losses, not simply the destruction of tangible property. Thus, this Court has held that con-

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[7] See, *e.g.*, *Leicester* v. *Hoadley*, 71 P. 318, 320 (Kan. 1903).

[8] See, *e.g.*, *Wade* v. *Kalbfleish*, 58 N.Y. 282, 287 (1874); *Zabriskie* v. *Smith*, 13 N.Y. 322, 333 (1855).

[9] See, *e.g.*, *Times-Democrat Pub. Co.* v. *Mozee*, 136 F. 761, 763 (5th Cir. 1905); *McDonald* v. *Brown*, 51 A. 213, 214 (R.I. 1902); *Hutcherson* v. *Durden*, 39 S.E. 495 (Ga. 1901); *Johnson*, *supra*; *Thompson*, *supra*.

[10] See, *e.g.*, *McChristal* v. *Clisbee*, 76 N.E. 511 (Mass. 1906).

[11] See, *e.g.*, *Zabriskie* v. *Smith*, 13 N.Y. 322, 333 (1855).

[12] Courts have construed the term more narrowly only when they have found a clear legislative purpose to limit the application of the relevant statute. See, *e.g.*, *Engelking* v. *Von Wamel*, 26 Tex. 469, 470-471 (1863) (slander is not an injury to the person within the jurisdiction of justices of the peace); *Smith* v. *Sherman*, 58 Mass. 408, 413 (1849) (nonphysical injuries are not "damage to person" for which an action survives the death of the victim); *Ward* v. *Blackwood*, 41 Ark. 295, 299 (1883) (relying on *Smith*). A narrow construction is inappropriate here, because there is no indication that Congress intended a meaning more limited than the ordinary meaning. As this Court has counseled, the Reconstruction civil rights acts should be "accord[ed] a sweep as broad as [their] language." *United States* v. *Price*, 383 U.S. 787, 801 (1966).

[13] Not all intangible harms were compensable at common law. The traditional rule was that mental injury was not compensable unless it was real. Mere annoyance, vexation, or inconvenience could not support an award of damages. See, *e.g.*, T. Sedgwick, *A Treatise on the Measure of Damages* § 46a, at 74-75 (9th ed. 1912).

sumers who allegedly paid higher prices as a result of anti-competitive activity had suffered an injury to property within the meaning of the Clayton Act. *Reiter*, 442 U.S. at 339. Similarly, this Court has also held that conversion is an injury to property within the meaning of the Bankruptcy Act. *McIntyre* v. *Kavanaugh*, 242 U.S. 138, 141 (1916). See also *Crawford* v. *Johnson*, 6 F. Cas. 777, 778 (Cir. Ct. D. Ore. 1868) (No. 3369) (debt arising from embezzlement of funds is an injury to property). As this Court noted in *Reiter*, "the word 'property' has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage, 'property' comprehends anything of material value owned or possessed. Money, of course, is a form of property." 442 U.S. at 338 (citation omitted).

2. Restricting Section 1985(2) to injuries involving bodily harm or destruction of tangible property would deny full effect to Congress's purpose in enacting the statute. Congress passed the Civil Rights Act of 1871 (popularly known as the Ku Klux Klan Act) in response to widespread lawless activity and resistance to federal authority in the South. Although that lawlessness and resistance to authority often involved bodily harm or physical destruction of property, it was also manifested in other ways.

Members of Congress were concerned that perjury, jury nullification, witness intimidation, and other abuses were rendering the state court justice system ineffective.[14] Few

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[14] Representative Coburn's colorful language accurately conveys the view of many Members:

> The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress.

Cong. Globe, 42d Cong., 1st Sess. H. 459 (1871). See also *id.* at S. 158 (Sen. Sherman); *id.* at H. 320-321 (Rep. Stoughton); *id.* at S. app. 252 (Senator Morton); *id.* at H. 437 (Rep. Cobb); *id.* at H. 481 (Rep. Wilson of Indiana); *id.* at S. 654 (Sen. Osborn).

perpetrators were being convicted, even when the evidence of their guilt was clear.[15] Members of the Ku Klux Klan and their sympathizers were expected to give perjured testimony to exonerate Klan members who were accused of a crime. If selected to be on the jury, Klan members were expected to acquit, regardless of the strength of the evidence.[16]

In response to those problems, Congress enacted Section 1985(2) to protect witnesses, parties and jurors in federal courts from intimidation and retaliation. See Cong. Globe, 42d Cong., 1st Sess. S. 567 (1871) (Senator Edmunds). Congress framed the language of the statute broadly, to address the breadth of the problem it confronted. Those Members who discussed the provision at issue in this case also described it in broad terms. See *id.* at H. 486 (Rep. Cook) ("Now, if there be any combination of men who shall combine and conspire together for the purpose of preventing * * * a witness from testifying in a court of the United States * * * or to punish a witness for testifying truthfully, that combination is an offence against the United States."); *id.* at S. 568 (1871) (Senator Edmunds) (Section 2 "gives a civil action to anybody who shall be injured by the conspiracy."). Thus, the statutory language as well as its purpose refute any contention that "injur[y] in person or property" is limited to physical harm.

C. Loss of At-Will Employment Entails Injury In Person Or Property

1. Damages caused by the termination of employment are "injur[y] in person or property" within the meaning of

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[15] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. H. 374 (1871) (Rep. Lowe); *id.* at S. 505 (Senator Pratt); *id.* at S. 608 (Sen. Edmunds).

[16] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. S. 158 (1871) (Sen. Sherman); *id.* at H. 320-321 (Rep. Stoughton); *id.* at S. app. 252 (Sen. Morton).

Section 1985(3) (clause iii). Termination of employment results in monetary losses such as lost wages and lost benefits. Usually, the terminated employee also incurs expenses to find substitute employment. Loss of employment may also give rise to intangible injuries such as emotional distress, loss of self-esteem, and diminished professional reputation.

All of those harms were routinely compensated in tort actions in the second half of the nineteenth century. See, *e.g.*, *Beckwith* v. *Bean*, 98 U.S. 266, 276 (1878) (damages may include "direct expenses incurred by the injured party, his loss of time, his bodily sufferings, under some circumstances his mental agony, his loss of reputation, the degree of indignity involved in the wrong done, and the consequent public disgrace attending the injury"); *Harris* v. *Union Pacific R.*, 13 F. 591, 592, 594 (Cir. Ct. D. Col. 1882) (McCrary, C. J.) (allowing damages for loss of wages based on plaintiff's claim that he was "injured in his person" by defendant's negligence). Courts in the early twentieth century readily concluded that harms caused by loss of employment were injuries to person or property.[17] And courts today continue to hold that loss of employment results in injuries to person[18] and property.[19]

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[17] See, *e.g.*, *Scott* v. *Prudential Outfitting Co.*, 155 N.Y.S. 497, 499 (N.Y. App. Term 1915) (at-will employment); *People* v. *Warden*, 130 N.Y.S. 698 App. Div.), affirmed, 99 N.E. 1116 (N.Y. 1912); *State* v. *Kramer*, 115 A. 8, 11 (Del. Ct. of Gen. Sess. 1921).

[18] *Baab* v. *AMR Serv. Corp.*, 811 F. Supp. 1246, 1262 (N.D. Ohio 1993) (emotional distress arising out of constructive discharge is injury to the person); *Stringer* v. *Sparrow Hosp.*, 233 N.W.2d 698 (Mich. Ct. App. 1975) (wrongful loss of employment causes injury to the person). Cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661-662 (1987) (employment discrimination claims under 42 U.S.C. 1981 are analogous to claims for personal injuries for purposes of borrowing state statute of limitations); *Wilson* v. *Garcia*, 471 U.S. 261, 277, 280 (1985) (same with respect to claims under Section 1983). It is also worth noting that

Respondents contend (Resp. Garrison, et al. Br. in Opp. 19) that the 1871 Congress never expressly contemplated that the statute would apply to retaliatory discharges. As this Court has noted, however, the fact that a statute applies "in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 118 S. Ct. 1952, 1956 (1998). Congress could have chosen to limit the language of its corrective legislation to the southern States, to the Ku Klux Klan, or to the precise types of outrages persons had testified were occurring in 1871. Legislation, however, often addresses specific problems in more general ways. See *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1335 (7th Cir.), cert. denied, 434 U.S. 975 (1977). And it cannot be doubted that intimidating witnesses by discharging employees who testify in federal court proceedings threatens corruption of the judicial process of the type Congress feared when it enacted Section 1985(2).

Congress in 1871 saw the problem of witness intimidation and retaliation as a severe threat to the administration of justice in the federal courts, and it enacted Section 1985(2) to address that problem. The methods of witness intimidation most prevalent today may or may not be the same as those in common use in 1871, but Congress used

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Westlaw's keynote system categorizes loss of earnings as injury to the person. See Westlaw 115k99.

[19] See, *e.g.*, *Portman*, 995 F.2d at 909 (termination of at-will employment results in injury to property under Section 1985); *Irizarry*, 722 F.2d at 871 (refusal to rehire causes injury to property under Section 1985(2)); *Troy* v. *Interfinancial, Inc.*, 320 S.E. 2d 872, 877 (Ga. Ct. App. 1984) ("an employee, generally, has a property right in his contract of employment (written or verbal) (even if it is at the will of the employer) which may not be unlawfully interfered with by another"); *State* v. *Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) (threat of loss of employment is threat of injury to property).

language broad enough to reach the wide variety of methods by which witnesses can be subjected to intimidation and retaliation, including methods that it may not have contemplated at the time. That broad language must be respected. See *Brogan* v. *United States*, 118 S. Ct. 805, 809 (1998).

2. The fact that petitioner was employed "at will" does not mean he could not be "injured in person or property" by the termination of his employment. As a general matter, an employee does not forfeit his rights under federal law because his employment is at will under state law. As one Georgia court noted in explaining the interaction between the doctrine of at-will employment and federal statutes, "an at-will employee whose employment is 'wrongfully' terminated in violation of the public policy that is established by specific state or federal statutes may pursue his applicable statutory remedy without being barred by the proposition that an employer otherwise incurs no liability for discharging an at-will employee." *Borden* v. *Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990). At-will status simply means that an employee may be discharged for any reason that does not violate state or federal law. It does not mean that an employer, or others, may ignore state and federal protections extended to the employee.[20]

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[20] Nor can respondents credibly suggest that an at-will employee whose employment has been terminated in violation of federal law nonetheless suffers no harm because the employee could, theoretically, have been discharged for other reasons. At-will employees discharged for reasons that violate federal law may recover the economic damages sustained because of the wrongful discharge. See, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 277 (1977). The defendant may attempt to prove that the employee would have been discharged in any event for lawful reasons, but that fact must be proved. See *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362-363 (1995); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 252-253 (1989)

This Court has consistently affirmed that principle. For example, public employees who are discharged in retaliation for exercising their First Amendment rights may have a valid cause of action under 42 U.S.C. 1983 (1994 & Supp. II 1996), even if they are defined as at-will employees under state law. See *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283-284 (1977). Government contractors enjoy similar protection, even if their contracts are terminable or non-renewable at-will. *See Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 684-685 (1996). Similarly, the courts of appeals have uniformly held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects at-will employees from discriminatory discharge. See, *e.g.*, *Mardell* v. *Harleysville Life Ins. Co.*, 31 F.3d 1221, 1233 (3d Cir. 1994), vacated on other grounds, 514 U.S. 1034 (1995); *Washington* v. *Lake County*, 969 F.2d 250, 256 (7th Cir. 1992). So too, Section 1985(2) (clause i) protects at-will employees from discharge to prevent or to retaliate against them for the exercise of the right to be a federal witness.[21]

(plurality opinion); *id.* at 260 (White, J. concurring in judgment); *id.* at 261 (O'Connor, J., concurring in judgment); *Mt. Healthy*, 429 U.S. at 287. The trier of fact may not simply assume that, because an employee could have been fired for other reasons, that necessarily would have happened. Proving that the same decision would have been justified is not equivalent to proving that the same decision would have been made. See *McKennon*, 513 U.S. at 360.

[21] Respondents' reliance on *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Bishop* v. *Wood*, 426 U.S. 341 (1976), is misplaced. Those decisions concern the property interest that a public employee must demonstrate in his or her job in order to invoke the Constitution's protection of procedural due process. Because a cause of action under Section 1985(2) (clause i) does not require injury to a constitutionally protected interest, see pp. 6-11, *supra*, whether petitioner has been deprived of property within the meaning of the Due Process Clause is not relevant to his claim under the statute. Nothing in *Roth* or *Bishop* suggests that a person who lacks a property interest protected by procedural due process because his employment is at will is thereby deprived of compensation for injuries that he sustains when his employment is terminated in violation of federal law. Indeed, this Court has held to the contrary. See note 20, *supra*; *Mt. Healthy*, 429 U.S. at 277, 283-284.

Exempting at-will employees from the protection of Section 1985(2) would make the vindication of important federal interests depend on the vagaries of state law. This Court avoids that result if possible whenever Congress has created a federal statutory right, because "federal statutes are generally intended to have uniform nationwide application." See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989).

A conclusion that the rights created by Section 1985(2) turn on state law would be particularly inappropriate. Congress enacted the Civil Rights Act of 1871 precisely because it believed that a federal solution was necessary to the disorder and anarchy that plagued the southern United States at that time. Many Members of Congress expressed concern that state authorities were unwilling or unable to act effectively to prevent unlawful conduct. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. S. 158 (1871) (Sen. Sherman); *id.* at H. 320-321 (Rep. Stoughton); *id.* at S. app. 109 (Sen. Pool); *id.* at H. 394 (Rep. Rainey); *id.* at S. app. 252 (Senator Morton). For example, one Member of Congress noted an incident in Florida in which a Florida court had ruled that Florida law provided no remedy for victims whose home had been invaded by armed men. See *id.* at H. 447 (Rep. Butler). Given the congressional skepticism about state authorities and processes that prompted enactment of Section 1985(2), this Court should not impute to Congress the intent to make the statute's protection depend on the very state law mechanisms that Congress found inadequate in the first place.

III. THE ALTERNATIVE GROUNDS FOR AFFIRMANCE PROFFERED BY RESPONDENTS LACK MERIT

A. Section 1985(2) Is Not Limited To Conduct Involving Force Or The Threat Of Force

Contrary to respondents' suggestion (Garrison, et al. Br. in Opp. 23-25), Section 1985(2) is not limited to conspiracies that involve force or the threat of force. The limitation advocated by respondents is unsupported by the statute's language and legislative history, would undermine the statute's purpose, and has not been adopted by the courts of appeals.

Respondents attempt to ground a requirement of force or the threat of force in the statutory provision that proscribes conspiracies to deter testimony by "force, intimidation, or threat." 42 U.S.C. 1985(2) (clause i). However, "force" is only one of the three alternate means of deterrence prohibited by the statute. Neither "intimidation" nor "threat" requires force or threat of force.

In 1871, "intimidation" included any action that reasonably inspires fear in another.[22] See N. Webster, *supra*, at 710 (defining "intimidate" as "to make timid or fearful; to inspire with fear; to dishearten; to abash."). At that time, courts frequently used the words "intimidate" or "intimidation" to refer to actions that did not involve the use or threat of force, but involved economic coercion. See, *e.g.*, *United States* v. *Castillero*, 67 U.S. (2 Black) 17, 91 (1863) (threat to expose legal documents); *Mendenhall*

[22] The word has virtually the same meaning today. See *Random House Dictionary of the English Language* 1000 (2d ed. 1987 unabridged) (defining "intimidate" to mean: "1. To make timid; fill with fear; 2. To overawe or cow, as through the force of personality or by superior display of wealth, talent; 3. To force into or deter from some action by inducing fear; to intimidate a voter into staying away from the polls.").

v. *Carter*, 17 F. Cas. 12, 14 (W.D.N.C. 1872) (No. 9426) (threat to file proceedings in bankruptcy court); *Pitzer* v. *Russell*, 4 Or. 124, 127 (1871) (accumulation of costs in legal proceedings). In the ensuing decades, a number of courts held explicitly that statutes proscribing "intimidation" were not limited to actions involving the use or threat of force but also applied to economic coercion. See, *e.g.*, *Vegelahn* v. *Guntner*, 44 N.E. 1077 (Mass. 1896) (intimidation not limited to threats of violence or physical injury); *Baldwin* v. *Escanaba Dealer's Ass'n*, 130 N.W. 214, 219 (Mich. 1911) (same); *Lohse Patent Door Co.* v. *Fuelle*, 114 S.W. 997, 1004 (Mo. 1908) (same); *Barr* v. *Essex Trades Council*, 30 A. 881, 888 (N.J. Ch. 1894) (same).[23]

The term "threat" is also not limited to threat of force or violence. See N. Webster, *supra*, at 1378 (defining threat as "denunciation of ill; declaration of an intention or determination to inflict punishment, loss, or pain on another; a menace"); *Random House Dictionary of the English Language* 1975 (2d ed. 1987 unabridged).

In any event, the statute prohibits not only conspiracies to deter participation in federal court proceedings by "force, intimidation, or threat" but also conspiracies to injure a person "in his person or property" on account of the person's testifying in or attending federal court. As explained above, injury to person or property need not necessarily result from the use or threat of force. See pp. 15-17, *supra*.

When Congress has wanted to limit the reach of a statute proscribing interference with federally protected

[23] Indeed, this Court has recognized, in a different context, that termination of employment may constitute a means of intimidation. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-47 (1937) (National Labor Relations Act prohibits employers from discharging employees in order to "intimidate or coerce [them] with respect to their self-organization and representation").

rights to actions involving "force or threat of force," it has done so expressly. See, *e.g.*, 18 U.S.C. 245(b) (interference with federally protected activities); 18 U.S.C. 248(a)(1)-(3) (access to clinic entrances); 42 U.S.C. 3631 (interference with fair housing rights). Indeed, another provision of Section 2 of the Civil Rights Act of 1871 prohibited a conspiracy "by *force* to seize, take, or possess any property of the United States contrary to the authority thereof." 17 Stat. 13 (emphasis added). The absence of any such limitation in Section 1985(2) (clause i) strongly indicates that Congress did not intend to limit the statute's prohibition to actions involving force or the threat of force.

The legislative history of the proposed Sherman Amendment to the Civil Rights Act of 1871 supports that conclusion. The Sherman Amendment, which was approved by the Senate, would have made cities, counties, and parishes liable for certain injuries caused by mob violence. Unlike most other provisions of the Civil Rights Act of 1871, the Sherman Amendment would have applied only to actions that resulted in the destruction of tangible property or bodily injury by "force and violence."[24] See Cong.

[24] The Sherman Amendment provided in relevant part:

> That if any house tenement, cabin, shop, buildings, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with *force and violence* be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case, the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead.

Cong. Globe, 42d Cong., 1st Sess. S. 755 (1871) (emphasis added).

Globe, 42d Cong., 1st Sess. S. 755 (1871). The Sherman Amendment was not approved by the House, and the final bill eliminated it in favor of a different provision that was ultimately codified at 42 U.S.C. 1986. See *id.* at H. 804. The language of the Sherman Amendment, however, illustrates that when legislators in 1871 wanted to reach only conduct that involved "force and violence" and destruction of tangible property, they thought it feasible and necessary to state that limitation expressly. Congress could have included similar language in Section 1985(2) had it intended to limit that Section to acts involving force or threat of force, and it did not do so.

Limiting the reach of the statute to intimidation or retaliation that involves force or the threat of force would frustrate the statute's broad purpose. As described above, Congress's concerns in passing Section 1985 were not limited to curbing violence. Congress was also concerned with the corruption of the state judicial system through such non-violent means as jury nullification and perjury by persons who were sympathetic to the lawless conduct of the Ku Klux Klan. See pp. 17-18, *supra*. The threat of terminating employment and other acts of economic coercion are just as likely to foster the corruption of the judicial process that Congress sought to eliminate as the threat of violence.

It is thus not surprising that no court of appeals has endorsed respondents' crabbed viewed of the protection afforded by Section 1985(2) (clause i). The courts of appeals have sustained actions under the statute based on a variety of conspiracies that did not involve force or the threat of force. See, *e.g.*, *Irizarry*, *supra* (failure to rehire); *Portman*, *supra* (retaliatory discharge); *Wright* v. *No*

Skitter, Inc., 774 F.2d 422 (10th Cir. 1985) (conspiracy to defeat low bidder on contract); *McCord*, *supra* (misconduct by attorney); cf. *Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir.) (defamation causes injury sufficient to support action under Section 1985(1)), cert. denied, 469 U.S. 826 (1984); *Stern*, *supra* (same).[25]

B. Limiting Section 1985(2) Is Not Necessary To Avoid Creating A General Federal Tort Law

Respondents' suggestion (Resp. Garrison, et al. Br. in Opp. 15) that Section 1985(2) (clause i) must be given a narrow interpretation to avoid creating an open-ended federal tort law has already been rejected by this Court. As the Court explained in *Kush*, 460 U.S. at 726, the concerns that caused Congress to narrow the scope of Section 1985(3) (clause i) are not implicated by Section 1985(2) (clause i). See p. 10, *supra*. Because 1985(2) (clause i) makes actionable only conspiracies to interfere with the federal courts, there is no danger of federalizing tort law. See *Kush*, 460 U.S. at 723, 726. Nor is there any need to constrain the scope of the statute to avoid doubts about Congress's authority to enact the provision. See *Kush*, 460 U.S. at 727; *McCord*, 636 F.2d at 614 n.12, 617.

Section 1985(2) (clause i) does not prohibit all interference with the federal courts. First, the statute reaches only conspiracies and does not cover unilateral ac-

[25] Even the Eleventh Circuit in *Morast* v. *Lance*, 807 F.2d 926, 930 (1987), did not hold that the statute only proscribes conspiracies involving force or threat of force. The court of appeals did hold, however, that allegations of "anger and vindictiveness, extensive questioning regarding leaks to the press, exclusion from board meetings, and a decreased workload" do not constitute "force, intimidation, or threat." Judge Meskill of the Second Circuit has suggested that the phrase "force, intimidation, or threat" should be read to "require evidence of physical force, threats of violence, or similarly malevolent acts," *Keating* v. *Carey*, 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting), but the Second Circuit has not adopted that view.

tion. See *Irizarry*, 722 F.2d at 872.[26] Second, the statute requires proof that the purpose of the conspiracy was improper—either to deter someone from participating in federal court proceedings or to injure someone in retaliation for his participation. Proof of the required motive will ordinarily be difficult unless the injury or threatened injury posed by the alleged conspiracy is sufficiently severe that a reasonable person would feel compelled not to attend court or to testify untruthfully. Finally, the plaintiff must establish either the deprivation of a federal right or privilege, or damage of a type compensable in a common law tort suit. See pp. 12-17 & note 13, *supra*.

The alleged conspiracy in this case falls squarely within the prohibition of the statute. Conspiracies to discharge employees in retaliation for testifying truthfully in federal court present precisely the type of threat to the integrity of federal judicial proceedings that Section 1985 was intended to address. The loss of earnings suffered by petitioner as a result of the termination of his employment is a concrete, economic harm of the type routinely compensated at common law and is substantial enough to support an action under the statute.[27]

[26] One potential issue in some retaliatory discharge cases under Section 1985(2) is whether the intra-corporate conspiracy doctrine, which holds that employees of a single entity cannot conspire with each other, applies to claims brought under the statute. This Court has never addressed that question. See *Hull* v. *Schuck*, 501 U.S. 1261 (1991) (White, J. dissenting from the denial of the petition for certiorari). Respondents did not raise that issue in the court of appeals, and it is not encompassed in the question presented by the petition for certiorari. In any event, in this case, the alleged conspirators were not all employed by the same corporation at the time of the alleged conspiracy, so the doctrine would not be applicable. See *Irizarry*, 722 F.2d at 872.

[27] Respondents also urge affirmance on two grounds that are not fairly included in the question presented by the petition for certiorari, that were not passed on by the district court or court of appeals, and

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed, and the case remanded with instructions to reinstate the complaint.

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that are, in any event, without merit. First, respondents suggest that Section 1985(2) (clause i) provides a remedy in damages only for parties to litigation. Although the remedy clause (Section 1985(3) (clause iii)) uses the term "party" when it describes who may sue for damages under the statute, that term is used as a synonym for "person" and is not intended to restrict actions for damages to parties to a court proceeding. See *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 & n.7 (10th Cir. 1994). Because the remedy clause applies to actions based on all the conspiracies prohibited by Section 1985, most of which do not even involve court proceedings, reading "party" as limited to a party to a judicial proceeding would vitiate the statute. In fact, as enacted, the statute used the word "person" rather than "party." See 17 Stat. 14 (reprinted at App., *infra*, 5a). The substitution of the term "party" occurred when all federal statutes were consolidated in the Revised Statutes, and as explained at note 2, *supra*, the consolidation was not intended to change the meaning of the statutes.

Respondents' second contention—that Section 1985(2) (clause i) is only implicated when a witness actually testifies in court—conflicts with the plain statutory language, which prohibits retaliation against a witness who has "attended or testified." 42 U.S.C 1985(2) (clause i). Moreover, respondents' limitation on the statute would frustrate its purpose by depriving plaintiffs of a cause of action whenever a conspiracy to deter testimony is successful. See *Chahal* v. *Paine Webber, Inc.*, 725 F.2d 20, 24 (2d Cir. 1984).

Respectfully submitted.

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JULY 1998

APPENDIX

1. Section 1985 of Title 42, United States Code, provides:

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

[Clause i] If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; **[Clause ii]** or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the

due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

[Clause i] If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; **[Clause ii]** or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; **[Clause iii]** in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

2. Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provides:

That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States, contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to

by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or Supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall

determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right to privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

MOTION FILED

JUL 2 4 1998

No. 97-1472 (9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MICHAEL A. HADDLE,
Petitioner,

v.

JEANETTE G. GARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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38 pp

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MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law hereby requests, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of the Petitioner. The issues to be decided herein affect the interests of the Lawyers' Committee, as set forth in the accompanying brief.

The Lawyers' Committee obtained the consent of the Petitioner and of Respondents Jeanette G. Garrison, HLM, Inc.

(f/k/a "Healthmaster"), Christopher Garrison, and G. Peter Molloy. Letters of consent have been filed with the Clerk of the Court. It was unable to reach Respondent Dennis Kelly to obtain his consent because he is incarcerated.

For the foregoing reasons, the Lawyers' Committee's Motion for Leave to File a Brief as *Amicus Curiae* in support of the Petitioner should be granted.

Respectfully submitted,

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July 24, 1998

QUESTION PRESENTED

Whether an at-will employee is "injured in his person or property" when he is fired, in violation of the first clause of 42 U.S.C. § 1985(2), because he had cooperated in a federal criminal investigation of his employer, testified under subpoena before a federal grand jury, and was a potential witness in federal criminal proceedings against his employer?

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization founded in 1963 by leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its Board of Trustees has included several past Presidents of the American Bar Association, past Attorneys General of the United States, past Solicitors General of the United States, past Assistant Attorneys General for the Civil Rights Division of the Justice Department, past Chairs of the Equal Employment Opportunity Commission, past Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last thirty-five years, the Lawyers' Committee and local Committees in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. have represented members of minority groups and women in hundreds of civil rights cases.

This case concerns the proper interpretation of 42 U.S.C. § 1985(2), an important civil rights statute enacted as part of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, also known as the Ku Klux Klan Act. In recognition of the fact that parties and witnesses might be intimidated or prevented by others from testifying or appearing in federal court, this statute seeks in part to preserve the integrity of federal judicial proceedings and to safeguard the right of access to the federal courts. The

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[1] The position that the Lawyers' Committee takes in the following brief has not been approved or financed by Petitioner or his counsel. No counsel for any party had any role in authoring this brief.

Lawyers' Committee, which was created in order to assist individuals in securing a judicial forum for the resolution of their civil rights claims, has a strong interest in the outcome of this case because it will affect the degree to which § 1985(2) safeguards access to the federal courts for civil rights plaintiffs and witnesses. If affirmed, the decision below would deny the protections afforded in § 1985(2) to individuals working under employment contracts of indefinite length -- "at-will employees" -- who constitute more than 88% of private, nonagricultural wage and salary employees in the United States, and many others, and would thereby substantially undermine the statute's fundamental purpose of protecting those who testify about, or cooperate in investigations into, violations of law.

STATEMENT

A. Statutory Background.

The statutory provision codified at 42 U.S.C. § 1985(2) was enacted during Reconstruction as part of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, also known as the Ku Klux Klan Act. See *Kush* v. *Rutledge*, 460 U.S. 719, 724 (1983).[2] The Act creates a private cause of action on behalf of any person injured by any act in furtherance of a conspiracy to interfere with federal judicial proceedings by using "force, intimidation, or threat[s]" "to deter . . . any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to

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[2] Section 2 of the Ku Klux Klan Act of 1871 includes language that is virtually identical to that in 42 U.S.C. § 1985(2). *See Kush*, 460 U.S. at 728 (Appendix).

injure such party or witness in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2).[3] Congress concluded that "[p]rotection of the processes of the federal courts was an essential component of [the] solution to disorder and anarchy in the Southern States"

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[3] 42 U.S.C. § 1985(2) provides:

> Obstructing justice; intimidating party, witness, or juror
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> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

during Reconstruction. *Kush*, 460 U.S. at 727. This Court has stated that Congress' power to enact 42 U.S.C. § 1985(2) derives from "the Federal Government's unquestioned constitutional authority to protect the processes of its own courts." *Kush*, 460 U.S. at 723.

Two aspects of the statutory structure should be noted. *First*, 42 U.S.C. § 1985(2) actually contains two clauses. The first clause addresses interference with *federal* judicial proceedings. The second clause addresses interference with *state* judicial proceedings. Only the first clause is at issue in this case. *Second*, the language creating the cause of action for violation of § 1985(2) actually is in the last clause of § 1985(3), which provides that a party who is "injured in his person or property" or denied any "right or privilege of a citizen of the United States" by "any act in furtherance of the object of [a] conspiracy" defined in § 1985 may recover damages.[4]

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[4] The relevant portion of 42 U.S.C. § 1985(3) provides:

> . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

B. Factual Background

Petitioner's Amended Complaint provides the facts upon which this case must be decided because the court of appeals affirmed the district court's decision dismissing the Complaint as a matter of law.

Petitioner Michael A. Haddle was employed from September 1986 until June 1995 by Respondent Healthmaster, Inc. ("Healthmaster") or one of it subsidiaries. Complaint ¶¶ 7, 8, 16. According to the district court, Petitioner "concedes that he was an at-will employee" at all relevant times. Pet. App. 4a. On March 8, 1995, a grand jury in the Southern District of Georgia filed an indictment against Healthmaster and other Respondents, charging 133 counts of health care fraud. Complaint ¶ 12. Petitioner had "cooperated with the investigation by federal agents which preceded this indictment and testified pursuant to subpoena before said grand jury and appeared pursuant to subpoena to testify before said grand jury, although his testimony was not actually taken due to the press of time." Complaint ¶ 14.[5] In April or May of 1995, a trustee

[5] This statement, which is quoted verbatim from the Complaint, suggests that Petitioner was called to appear before the grand jury on more than one occasion, but did not testify on every occasion. In their oppositions to the petition for certiorari, some of the Respondents claim that the Complaint suggests that Petitioner, although subpoenaed, did not actually testify due to the press of time. Brief in Opposition of Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison 3; Brief in Opposition of G. Peter Molloy (continued...)

in bankruptcy was appointed for Healthmaster under chapter 11 of the federal Bankruptcy Code. Complaint ¶ 9. After their indictment, Respondents Garrison and Kelly were banned from participation in the affairs of Healthmaster Home Health Care, Inc., by order of the bankruptcy court. Complaint ¶ 15.

"[P]ursuant to a prior understanding and agreement between" Respondents Garrison, Molloy, and Kelly, Petitioner was terminated from his employment on June 21, 1995, after Respondents "had become aware that [Petitioner] would appear as a witness at the criminal trial" on the indictment. Complaint ¶ 16. The termination was "for the purpose of retaliating against [Petitioner] for his cooperation with federal agents and his testimony under subpoena to the federal grand jury, and in order to intimidate [Petitioner] and others from cooperating with federal agents or testifying in any criminal matters against [the Respondents] including [the] indictment." Complaint ¶ 18. In short, the termination was not for any legitimate business purpose, "but rather to protect [Respondents] as criminal defendants or potential criminal defendants" and to deter others from coming forward. Complaint ¶ 19.

Petitioner filed suit against Healthmaster and the other Respondents in the United States District Court for the

[5] (...continued)
2. This ambiguity is immaterial, however, because the statute prohibits not only retaliation against individuals who have provided testimony but also threats against, or intimidation of, individuals to deter testimony. In any event, this factual ambiguity could not be resolved against Petitioner on a motion to dismiss.

Southern District of Georgia. He brought claims under 42 U.S.C. § 1985(2) and Georgia state law. The claim under § 1985(2) alleged that Respondents "conspired within the State of Georgia to deter, by force, intimidation or threat, a party or witness in the United States District Court for the Southern District of Georgia, from attending such court, or from testifying in any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of the grand jurors of such court." Complaint ¶ 20. The claim further alleged that Petitioner was "injured in his person and property" by the acts of Respondents. Complaint ¶ 21.

C. Proceedings Below.

The district court granted the motions of four Respondents under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. The court held that under "binding precedent of the Eleventh Circuit," Petitioner could not maintain an action under section 1985(2) because he was an at-will employee. Pet. App. 5a. The court relied on and quoted the following passage from *Morast* v. *Lance*, 807 F.2d 926, 930 (11th Cir. 1987), which was the Eleventh Circuit's entire analysis of the issue:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because [Plaintiff] was an at-will employee . . . he had no constitutionally protected interest in continued employment. Therefore, [Plaintiff's] discharge did not constitute an actual injury under this statute.

Pet. App. 5a. The court declined to retain discretionary supplemental jurisdiction over the remaining state law claims. *Id.* at 6a.

The Eleventh Circuit affirmed the district court's decision in an unpublished, per curiam opinion. The court summarily held "that Haddle's arguments on appeal are foreclosed by this court's decision in *Morast* v. *Lance*, 807 F.2d 926 (11th Cir. 1987)." Pet. App. 2a.

SUMMARY OF ARGUMENT

The Eleventh Circuit's holding that 42 U.S.C. § 1985(2) does not protect at-will employees from intimidation and retaliation has no basis in the statutory text. The plain language of 42 U.S.C. § 1985(2) provides a cause of action for a person injured in any way by any act in furtherance of a conspiracy to interfere with federal judicial proceedings by threat, intimidation, or retaliation. The phrase "injured in his person or property" is broad and without qualification or limitation. Nor is there any textual support for the court of appeals' conclusion that Petitioner was required to demonstrate an injury that rises to the level of a separate and distinct constitutional violation. Indeed, this requirement of an independent constitutional violation is inconsistent with this Court's analysis and conclusion in *Kush* v. *Rutledge*, 460 U.S. 719 (1983). Nor can the Eleventh Circuit's ruling derive support from the procedural due process principles that this Court established in cases such as *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). This Court explicitly has held that a plaintiff's at-will employment status does not defeat his claim that he was fired in retaliation for exercising rights protected under federal law. See, *e.g.*, *Mount Healthy City*

Board of Education v. *Doyle*, 429 U.S. 274, 283-84 (1977) (First Amendment rights); *Perry*, 408 U.S. at 596-98 (same).

The legislative history of the Ku Klux Klan Act of 1871, from which 42 U.S.C. § 1985(2) is derived, confirms that Congress intended to provide a broad remedy for any and all manner of obstruction of federal judicial proceedings. The legislative history reveals that a principal focus of the legislation was to empower the federal courts to protect civil rights because the state courts were unable or unwilling to do so. Given the grave concerns that motivated Congress to provide remedies in the federal courts, including the Klan tactic of corrupting the courts, it is hardly conceivable that Congress intended to limit the types of injuries that might be actionable as a result of intimidation and retaliation that the 1871 Act covered. In addition, the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which proscribes voter intimidation in the form of retaliatory discharge, provides further evidence that Congress in the 1871 Act intended to proscribe employment retaliation as a means of subverting civil rights.

No purpose of the statute would be served by denying protection to at-will employees. To the contrary, the purposes of preserving the integrity of federal judicial proceedings and safeguarding the right of access to the federal courts would be undermined if at-will employees were denied protection. At-will employees represent a significant portion of the work force and are the class of employees that is most in need of protection against the types of improper retaliation and intimidation that 42 U.S.C. § 1985(2) proscribes. Accordingly, the Eleventh Circuit's interpretation of the statute cannot be consistent with Congress' intent because it creates a loophole for a significant

category of employer intimidation and retaliation that undermines the integrity of the federal courts.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE PROVIDES A CAUSE OF ACTION FOR A PERSON INJURED IN ANY WAY BY ANY ACT IN FURTHERANCE OF A CONSPIRACY TO INTERFERE WITH FEDERAL JUDICIAL PROCEEDINGS BY THREAT, INTIMIDATION, OR RETALIATION.

A. The Language of the Statute is Broad and Unlimited.

42 U.S.C. § 1985(2) provides a damages remedy to any person injured as a result of an act in furtherance of certain unlawful conspiracies. More specifically, a plaintiff must demonstrate that he was "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States" as a result of an act in furtherance of a prohibited conspiracy. 42 U.S.C. § 1985(3). The phrase "injured in his person or property" is broad and without qualification or limitation, consistent with the statute's purpose to discourage "all conspiracies, whatever their motivation or target, that use threats, force, or intimidation to deter free, full, and truthful testimony." *McCord* v. *Bailey*, 636 F.2d 606, 614 n.12 (D.C. Cir. 1980). The terms "injury to person" and "injury to property" are broadly inclusive terms of art that impose no limits on the *type* of injury that is compensable under the statute. Indeed, on their face, these general terms encompass all manner of physical, psychological, and economic injury. Thus,

the "injured in his person or property" language simply establishes that a plaintiff under 42 U.S.C. § 1985(2) must demonstrate that he suffered some injury that is compensable by monetary damages as a result of an act in furtherance of a conspiracy to intimidate a party, witness, or juror in a federal judicial proceeding.

The foregoing reading of the statutory text is consistent with this Court's approach to interpreting other Reconstruction-era civil rights laws, which has been to "accord [them] a sweep as broad as [their] language" in order to give them "the scope that [their] origins dictate." *United States* v. *Price*, 383 U.S. 787, 801 (1966); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). In *Price*, for example, this Court held that 18 U.S.C. § 241,[6] a criminal conspiracy statute derived from the Enforcement Act of 1870, encompasses rights protected by the Fourteenth Amendment because "its language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." 383 U.S.

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[6] 18 U.S.C. § 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
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> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured --
>
> They shall be fined under this title or imprisoned not more than ten years, or both. . . .

at 800 (emphasis in original). Similarly, in *Alfred H. Mayer*, this Court held that 42 U.S.C. § 1982,[7] a federal housing anti-discrimination statute derived from the Civil Rights Act of 1866, prohibits "*all* discrimination against Negroes in the sale or rental of property -- discrimination by private owners as well as discrimination by public authorities" because the plain language of the statute is broad and unlimited. 392 U.S. at 421 (emphasis in original). Under the approach followed by this Court in *Price* and *Alfred H. Mayer*, the phrase "injured in his person or property" must be read to encompass *all* types of injuries to person or property that result from conspiracies to interfere with federal judicial proceedings because the statutory language is unlimited on its face.

The foregoing statutory construction also is consistent with the only decision of this Court construing the first clause of 42 U.S.C. § 1985(2), *Kush* v. *Rutledge*, 460 U.S. 719 (1983). The issue before the Court in *Kush* was whether a plaintiff asserting a claim under the first clause of 42 U.S.C. § 1985(2), which applies to federal proceedings, must allege racial or class-based animus in order to establish a cause of action. Consistent with the broad principles of construction that it applied in *Price* and *Alfred H. Mayer*, the Court held that no such allegation is required because the clause "contain[s] no language requiring

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[7] 42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

that the conspirators act with intent to deprive their victims of the equal protection of the laws." *Kush*, 460 U.S. at 725.

The Court contrasted the first clause of § 1985(2) with the second clause of § 1985(2), which applies to *state* proceedings and expressly requires a denial of equal protection. The Court concluded that this textual difference in the clauses of § 1985(2) reflects a deliberate choice by Congress. Specifically, Congress deliberately added the "equal protection" language to the second clause of § 1985(2) and to other portions of the statute that "encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern." *Id.* Congress, however, did not add the "equal protection" language to the first clause of § 1985(2) because "[n]either proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal courts." *Id.* at 727.

In sum, in *Kush* the Court concluded that an allegation that private defendants had conspired to intimidate and threaten various potential material witnesses in order to prevent them from testifying "freely, fully and truthfully" in plaintiff's federal lawsuit was sufficient to state a cause of action under the first clause of § 1985(2) because: (1) the first clause of § 1985(2) broadly -- and without qualification -- proscribes any act in furtherance of a conspiracy to interfere with the administration of justice in federal courts; (2) there is no basis in the text of § 1985(2) for requiring proof of any racial or class-based animus; and (3) there is no reason to think Congress intended any such requirement since its power to provide a substantive remedy for intimidation of parties, witnesses, and jurors in federal courts derives directly from its unquestioned power

under the Constitution to establish the federal courts and to ensure the integrity of their proceedings.

The Court's reasoning in *Kush* compels the same result here. As in *Kush*, there simply is no basis in the broad statutory text for the narrowing construction adopted by the Eleventh Circuit. Just as the statutory text contains no language to suggest an added requirement of class-based animus, the statutory text contains no language to suggest an added requirement that the injury be to a distinct constitutionally protected interest. To the contrary, the text of the statute categorically guarantees to all persons the substantive right to participate in federal judicial proceedings, free from threats, intimidation or reprisal. Denial of that right is an injury in fact sufficient to invoke the civil remedy provided by Congress in the last clause of § 1985(3). Of course every plaintiff under § 1985(2), including at-will employees, must prove damages in order to recover more than a nominal award. Like the plaintiff in *Kush*, however, Petitioner is entitled to invoke the express cause of action created by Congress and have his day in court to prove damages. See *Kush* v. *Rutledge*, 460 U.S. at 723-27 & n.5.

B. The Court of Appeals' Interpretation of the Statute Has No Basis in the Statutory Text and is Inconsistent with the Decisions of this Court.

1. The court of appeals' conclusion that the statute does not protect at-will employees from intimidation and retaliation has no basis in the statutory text. On its face, there is nothing in the general and unlimited language of the statute to suggest that at-will employees are beyond the reach of its protection. Thus, it is not surprising that the Eleventh Circuit, in the decision below

and in *Morast* v. *Lance*, 807 F.2d 926 (11th Cir. 1987), did not discuss the statutory language at all, much less identify any statutory language in support of its holding. There is none.[8]

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[8] The lower court is not unique in failing to recognize any meaningful interest in contracts of employment for an indefinite term. Its decision joins company with the disturbing rulings of a number of lower courts that have held or suggested that 42 U.S.C. § 1981 does not apply to such contracts. *Gonzalez* v. *Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1034–35 (7th Cir. 1998) (*dictum*); *Hawkins* v. *Pepsico Inc.*, __ F. Supp. __, No. 6:96CV01013, 1998 WL 384733 (M.D.N.C. July 6, 1998); *Spriggs* v. *Diamond Auto Glass*, No. S97-1449, 1997 WL 880756 (D. Md. Oct. 15, 1997), *appeal pending*, No. 97–2575 (4th Cir.); *Moorer* v. *Grumman Aerospace Corp.*, 964 F. Supp. 665, 676 (E.D. N.Y. 1997), *aff'd*, No. 97–7790, 1998 U.S. App. LEXIS 3233 (2d Cir. Feb. 27, 1998); *Moscowitz* v. *Brown*, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994); *Simpson* v. *Vacco*, No. 96 CIV. 3916 (JFK), 1998 WL 118155 (S.D.N.Y., Mar. 17, 1998), *reconsidered on other grounds*, 1998 WL 264850 (May 26, 1998). *Contra McKnight* v. *General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (*dictum*); *Marquess* v. *City of Philadelphia*, No. 98-1117, 1998 WL 355519 (E.D. Pa. June 29, 1998); *Larmore* v. *RCP/JAS, Inc.*, No. 97-5330, 1998 WL 372647 (E.D. Pa. May 19, 1998); *Nguyen* v. *Benson Toyota*, No. 96-2644, 1996 WL 650902 (E.D. La. 1996) (rejecting argument); *Murray* v. *Board of Education of the City of New York*, 984 F. Supp. 169, 183–84 (S.D.N.Y. 1997) (allowing an at-will employee to pursue her § 1981 claims against defendant officials in their individual capacities); *Baker* v. *American Juice, Inc.*, 870 F. Supp. 878, 883 (N.D. Ind. (continued...)

The Eleventh Circuit's ruling is much broader than merely denying protection to at-will employees. The court held that Petitioner did not suffer actual injury because, as an at-will employee, "he had no constitutionally protected interest in continued employment." *Morast*, 807 F.2d at 930. Thus, the ruling denies protection to all victims of intimidation and retaliation who cannot allege injuries that rise to the level of a separate and distinct constitutional violation -- an interpretation that severely limits the range of injuries that are compensable under the statute. The court, however, offers no analysis -- textual or otherwise -- to support its sweeping conclusion that a plaintiff under 42 U.S.C. § 1985(2) is *required* to show violation of a constitutionally protected interest. There is nothing in the statutory language to suggest that a plaintiff must establish that the required injury "in his person or property" involves a distinct constitutional right or rises to the level of a separate constitutional violation.

2. In addition to being devoid of textual support, the Eleventh Circuit's requirement of injury to a constitutional interest in addition to the interest in protecting federal judicial process is inconsistent with this Court's analysis and conclusion in *Kush*. As explained above, the Court in *Kush* expressly rejected the argument that a plaintiff under § 1985(2) is required to demonstrate an equal protection violation. The Court's

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[8] (...continued)
1994) ("Although at-will employees do not have all the rights of employees who work under fixed-term employment contracts, '[e]mployment at will is not a state of nature' and at-will employees may bring claims under § 1981.") (citation omitted).

reasoning applies to other constitutional violations as well. The Court explained that there is no basis in the language of the first clause of § 1985(2) or the last clause of § 1985(3) for requiring proof of any other statutory or constitutional violation. Nor, the Court concluded, is there any basis for thinking Congress intended to require such proof because its power to protect the integrity of federal judicial proceedings by providing a remedy for witness intimidation is beyond question. Accordingly, *Kush* precludes the Eleventh Circuit's ruling that a plaintiff under 42 U.S.C. § 1985 must prove the existence of an independent constitutional violation.

3. In their opposition to the Petition for Certiorari, some of the Respondents suggested that the Eleventh Circuit's ruling is supported by the procedural due process principles this Court established in cases such as *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Brief in Opposition of Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison 15-18. This argument has no merit. In *Roth* and its progeny, the Court addressed the types of liberty and property interests that are afforded the protection of the procedural due process requirements of the Fourteenth Amendment. In *Roth*, for example, the Court held that a state college professor who had neither tenure nor a formal contract (*i.e.*, who essentially was employed at-will) did not have a property interest that entitled him to procedural due process protections under the Fourteenth Amendment, such as the right to a hearing prior to the nonrenewal of his contract. 408 U.S. at 576-78. The Court's conclusion that at-will employees are not entitled to pre-termination hearings is hardly surprising. Such hearings would serve little purpose because the nature of at-will employment

contracts is that employers can fire at-will employees at any time and for any non-prohibited reason.

The procedural due process analysis, however, has no bearing on the substantive question whether an employee is entitled to bring a cause of action for employment retaliation that violates 42 U.S.C. § 1985(2). This Court explicitly has held that a plaintiff's at-will employment status does not defeat his claim that he was fired in retaliation for exercising rights protected under federal law. See, *e.g.*, *Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 283 (1977) (untenured teacher could bring claim that employer discharged him in retaliation for exercising rights protected under the First Amendment, "[e]ven though he could have been discharged for no reason whatever and had no constitutional right to a hearing prior to the decision not to rehire him"); *Perry* v. *Sindermann*, 408 U.S. 593, 596-98 (1972) (same). Therefore, the fact that Petitioner had no due process right to a hearing prior to his discharge (both because he was an at-will employee and because his employer was not a state actor), does not defeat his entitlement to bring a claim under 42 U.S.C. § 1985(2).

The holdings in *Mount Healthy* and *Perry* simply recognize that a plaintiff's at-will employment status under state law does not provide an affirmative defense against a claim of unlawful retaliation under a clear and unqualified federal right. That is, where an employee is discharged in violation of his federal rights, he has a federal cause of action, notwithstanding principles of state law. See *Oubre* v. *Entergy Operations, Inc.*, 118 S. Ct. 838 (1998) (ratification and equitable estoppel defenses are unavailing against ADEA claims, where release of claims did not comply with the clear and unqualified requirements for waivers under the Older Workers Benefit

Protection Act); *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) (after-acquired evidence of employee wrongdoing is not a defense to a claim of improper discharge in violation of the ADEA). Thus, Georgia's at-will employment doctrine -- whatever its nature and contours -- is irrelevant to Petitioner's claim under 42 U.S.C. § 1985(2). The first clause of § 1985(2) and the last clause of § 1985(3) categorically provide that any person fired because of truthful testimony in a federal judicial proceeding is entitled to damages under federal law for any injury caused by such conduct, notwithstanding anything in Georgia law.

II. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED TO PROVIDE A CAUSE OF ACTION FOR A PERSON INJURED IN ANY WAY BY ANY ACT IN FURTHERANCE OF A CONSPIRACY TO INTERFERE WITH FEDERAL JUDICIAL PROCEEDINGS BY THREAT, INTIMIDATION, OR RETALIATION.

Because the plain language of 42 U.S.C. § 1985(2) is clear and unambiguous, the Court need not consider anything else in order to determine Congress' intent. *TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). Nevertheless, the legislative history of the Ku Klux Klan Act of 1871, from which 42 U.S.C. § 1985(2) is derived, as well as the language of other Reconstruction-era civil rights statutes, confirms that Congress intended to provide a broad remedy for anyone injured by an act in furtherance of a conspiracy to obstruct federal judicial proceedings.

A. The Ku Klux Klan Act of 1871.

The Ku Klux Klan Act of 1871 was one in a series of Reconstruction-era civil rights statutes designed to prevent civil rights violations and to provide the federal government with authority to address such violations. The Act specifically was designed to address the rising tide of violence and anarchy in the Southern states caused by the activities of the then recently formed Ku Klux Klan. 1 Bernard Schwartz, ed., *Statutory History of the United States, Civil Rights* 591 (1970) ("Schwartz"). Even though Congress had enacted previous civil rights legislation in the Civil Right Act of 1866 and the Enforcement Act of 1870, President Grant sent a message to Congress in 1871 urging it to enact additional legislation because the governments of the Southern states had proven unable to maintain basic social order in the face of the Klan's organized campaign to frustrate the exercise and enjoyment of these new federal rights.

The legislative history of the Ku Klux Klan Act reveals that a principal focus of the legislation was to empower the federal courts to protect civil rights because the state courts were unable or unwilling to do so. During the debates on the legislation, Representative Stoughton declared that "the State courts are notoriously powerless to protect life, person, and property" in the Southern states, where "thousands of murders and outrages have been committed . . . and not a single offender brought to justice." Cong. Globe, 42d Cong., 1st Sess., 322 (1871). See also *id.* at 321 ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminals"); *id.* at 459 (statement of Rep. Coburn) ("The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes

free, the persecuted citizen looks in vain for redress"); *id.* at 449 (statement of Rep. Butler) ("[T]he ordinary machinery of judicial tribunals is entirely inadequate to meet the great emergency which has arisen and erected itself into incipient war").

Moreover, Congress took express notice of the fact that a notorious and insidious Klan tactic was to infiltrate and subvert the integrity of state judicial proceedings. *Id.* at 321-22 (statement of Rep. Stoughton) ("[T]he Ku Klux System is ingeniously devised for the express purpose of enabling a few bad men to intimidate the masses of the people . . . and to control the State courts and local authorities by perjury and fraud"); *id.* at 320 (the Ku Klux organization protects its members "against conviction and punishment, first by disguises and secrecy, and second, by perjury, if necessary, upon the witness-stand and in the jury-box").

Given the grave concerns that motivated Congress to provide remedies in the federal courts as a critical means of enforcing civil rights and restoring social order, and the notorious Klan tactic of corrupting the courts, the only reasonable conclusion is that Congress intended to protect the integrity of the federal courts to the greatest extent possible, from all manner and all forms of interference by intimidation and retaliation. Congress plainly recognized the need to take precautions to protect the federal courts from subversion by the Klan. See, e.g., *id.* at 322 (statement of Rep. Stoughton) ("Congress has power . . . to fully investigate [Klan] outrages, and to provide for their trial and punishment in the United States courts *where perjury in the jury box and on the witness-stand can be guarded against.*") (emphasis added). In this context, it is hardly conceivable that Congress intended to limit the types of injuries that might be

actionable as a result of intimidation and retaliation that the 1871 Act covered, much less that it contemplated a broad exclusion for at-will employees.

This conclusion is further supported by the language that Congress chose. Although the legislative history does not contain any definition of the "injured in his person or property" language that came to be part of 42 U.S.C. § 1985(2), members of Congress used similar language throughout the Congressional debates in contexts indicating that the terms "person" and "property" were meant to be broadly descriptive of comprehensive categories of significant rights. For example, one member of Congress stated that "[t]he only use of governments, the only purpose for which they are instituted, is to protect persons in their *rights of person and property*." Cong. Globe, 42d Cong., 1st Sess., 579 (1871) (statement of Sen. Trumbull). See also *id.* at 320 (statement of Rep. Stoughton) ("There exists at this time in the southern States a treasonable conspiracy against the lives, *persons, and property* of Union citizens); *id.* at 322 ("It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, *person, and property*."); *id.* at 448 (statement of Rep. Butler) ("Can it be, then, that an American citizen is protected in his *rights of person and property* by the Constitution and laws of the United States, with the whole power of the Government, everywhere, except on our own soil, under his own roof-tree, and covered by our own flag?"); *id.* at 459 (statement of Rep. Coburn) ("It is a vain thing to assert the right of suffrage, of representation, and of equality of protection *as to person and property* if none is given to them"). All of these broad uses of the terms "person" and "property" suggest that the "injured in his person or property" language in the statute was not meant to be

language of limitation, but rather was meant to be broadly descriptive of any injury that might be compensated by money damages.

B. The Enforcement Act of 1870.

Other Reconstruction-era civil rights statutes provide further evidence that Congress intended in the Ku Klux Klan Act broadly to proscribe any and all manner of witness intimidation and retaliation relating to federal judicial proceedings, including retaliatory discharge in employment. Section 5 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140, 140-41 (reprinted in Schwartz, at 445-53) (emphasis added), which prohibits voter intimidation, provides:

> That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage . . . by means of bribery, threats, *or threats of depriving such person of employment or occupation*, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family . . . shall be deemed guilty of a misdemeanor.

Congress' express reference to threats to retaliate against all employees in a statute enacted at the same time as the 1871 Act, and designed to address the same problems and protect the same people, suggests that Congress was specifically aware of and intended to proscribe employment retaliation as a means of subverting civil rights.

The legislative history of the Enforcement Act of 1870 confirms that the Reconstruction-era Congress was cognizant of and intended to prevent threatened and actual discharge of employees as a means of interfering with civil rights. In *United States* v. *Price*, 383 U.S. 787 (1966), which concerned civil rights provisions that derived from the Enforcement Act of 1870, this Court discussed the legislative history and appended to its opinion the remarks of Senator Pool of North Carolina, who sponsored section 5 of the Act. Senator Pool expressly mentioned retaliatory discharge of employees as a means of voter intimidation: "It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by their employers." *Price*, 383 U.S. at 816 (Appendix). See also *id.* at 813 ("Suppose he threatens to discharge them from employment [for voting in a particular way] . . . It seems to me it is necessary that we should legislate against that").[9]

Unlike the 1870 Act, which enumerates the types of intimidation and threats that it prohibits, the 1871 Act categorically proscribes interference with federal judicial

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[9] In discussing the legislative history of the Reconstruction-era civil rights statute at issue in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968), this Court expressly noted that "[t]he congressional debates are replete with references to private injustices against Negroes -- references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters . . . " This provides further contemporaneous evidence that Congress was well aware of economic and employment retaliation against blacks.

proceedings "by force, intimidation, or threat." Because the language regarding threats in the 1871 Act is far broader than that in the 1870 Act, the former should be interpreted to encompass the threats enumerated in the latter, including "threats of depriving [a] person of employment," regardless of its at-will status. To the extent that the 1871 Act prohibits threats to deprive individuals of employment, it would be unreasonable to conclude that fulfillment of the threat -- in this case, employment retaliation -- does not constitute injury under the statute. At the very least, it would require particularly compelling evidence to support the conclusion that at the same time Congress expressly prohibited firing an at-will employee because of his vote, Congress intended to prohibit *all* retaliation against such an employee because of his participation as a party or witness in a federal judicial proceeding, *except* termination of his employment. As far as we have been able to determine, there is no evidence -- much less compelling evidence -- of any such intent. Thus, consistent with the broad scope that this Court has accorded to the Reconstruction-era civil rights statutes, the Ku Klux Klan Act should be interpreted to prohibit retaliatory termination of at-will employment.

III. NO PURPOSE OF THE STATUTE WOULD BE SERVED BY DENYING PROTECTION TO AT-WILL EMPLOYEES.

The foregoing analysis demonstrates that the principal purposes of 42 U.S.C. § 1985(2) are to preserve the integrity of federal judicial proceedings and to safeguard the right of access to the federal courts by prohibiting all manner of conspiracies to interfere with parties, witnesses, and jurors. No purpose consistent with the statute would be served, and the purposes suggested by its language would be significantly undermined,

if at-will employees were denied protection when employers retaliate against them for participating in federal proceedings. Thus, the court of appeals' interpretation of the statute is squarely inconsistent with Congress' intent because it creates a huge loophole that eviscerates the policies underlying the statute.

The exclusion of at-will employees from the coverage of 42 U.S.C. § 1985(2) would be a broad exclusion indeed. "In most states, virtually all non-union, private sector employees have been employees at will, subject to discharge at the whim of the employer." 1 Lex K. Larson, *Unjust Dismissal* § 1.01, at 1-2 to 1-3 (1998) ("*Larson*"). See also 137 Cong. Rec. E24,382 (Sept. 26, 1991) (statement of Rep. Clay) (more than 60 million private sector workers are employed at-will). Only a small proportion of private-sector employees are unionized. Only 2.2% of agricultural wage and salary workers are represented by unions and only 11.2% of private nonagricultural wage and salary workers are represented by unions. Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, ch. 18, Attach. 4, at 18:8701 (1997). Accordingly, more than 97% of agricultural wage and salary workers and more than 88% of private nonagricultural wage and salary workers are presumably at-will employees. Moreover, even employees in unionized industries do not usually have the protection of job-security provisions during their probationary periods, when they can be fired without cause. See, *e.g.*, Susan Tannenbaum, *Employee Relations Guide*, in 3 *Larson* § IIIB, at ERG-14 to ERG-15. In addition, many public sector employees are also employees at will. *E.g.*, *Zimmerman* v. *Cherokee County*, 925 F. Supp. 777, 781 (N.D. Ga. 1995) (deputy sheriffs in a Georgia county that does not have a civil service program are at-will employees); *Jackson* v. *Long*, 102 F.3d 722, 728-30 (4th Cir. 1996)

(sheriff's department employees in North Carolina are at-will employees).

At-will employees are not merely a significant portion of the work force. They also are the class of employees most vulnerable to the types of improper retaliation and intimidation proscribed by 42 U.S.C. § 1985(2). Because at-will employees do not have contractual rights, union representation, or procedural due process protections such as pre- and post-termination hearings, they are most in need of protection against employment retaliation as a result of their participation in federal proceedings. Indeed, under the decision below, the federally protected interests of at-will employees such as Petitioner effectively are placed at the mercy of employers -- even (and perhaps particularly) when the employer is facing serious criminal charges and the innocent employee is a material witness. In short, retaliatory discharge of at-will employees is such a classic and injurious form of intimidation that it would seem to lie at the core of the broad category of injuries covered by the statute.

Thus, the Eleventh Circuit's interpretation of the statute should be rejected because it creates a loophole for a huge and significant category of employer intimidation and retaliation that would undermine the integrity of the federal courts. At the same time, the Eleventh Circuit's interpretation would protect non-at-will employees, even though they may be less vulnerable to intimidation or retaliation, and have other contractual or procedural remedies. It is inconceivable that Congress intended this anomalous result.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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No. 97-1472

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37(3)(b) of the *Rules of the Supreme Court of the United States* (hereinafter "Rules"), the National Whistleblower Center (hereinafter "Center") moves, by and through counsel, for leave to file an *amicus curiae* brief in support of Petitioner in the above-captioned matter.

Pursuant to Rule 37(3)(a) of the Rules, the Center sought written consent from all the parties to the case to file an *amicus curiae* brief . The Center obtained such consent from every party save one, Respondent Dennis Kelly, who appears *pro se*. Mr. Kelly is currently incarcerated in Effingham County Jail, Springfield County, Georgia and has verbally informed the Center of his decision to withhold his consent to the filing of an *amicus curiae* brief by the National Whistleblower Center.

The Center is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. As such, the Center works directly with whistleblowers nationwide who have a direct and substantial interest in the outcome of this case. *See* Statement of interest, *infra*.

By filing an *amicus curiae* brief, the Center strives to help the Court by bringing to its attention relevant matter not already presented to the Court by the parties. For this reason and the reasons stated above, the National Whistleblower Center requests leave to file an *amicus curiae* brief in this matter.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center (Center)[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employees who have suffered retaliation due to the disclosure of matters in the interest of public health and safety. The Center aids employee whistleblowers who have been involved in environmental protection, nuclear safety, government accountability, and the advocacy of important public policy.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 33 states) and maintains an in-depth and informative Internet web site at *www.whistleblowers.org*. In 1990, the Center was admitted by this Court as an *amicus* in *English v. General Electric*, 110 S.Ct. 2270 (1990).

The Center works directly with whistleblowers nationwide, many of whom, similar to Petitioner in this case, have testified or will testify in federal proceedings. These whistleblowers have a distinct and substantial interest in the outcome of this case.

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[1] Pursuant to Rule 37.6, the Center maintains that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's counsel, Stephen M. Kohn, authored this brief in its entirety.

Counsel for Petitioner Michael A. Haddle and Respondents Jeanette G. Garrison, G. Peter Molloy, Jr., Healthmaster, Inc., and Christopher Garrison consented to the filing of an *amicus curiae* brief by the Center in this matter. Respondent Dennis Kelly, who appears *pro se*, did not grant his consent to the filing of an *amicus curiae* brief by the Center.

SUMMARY OF THE ARGUMENT

The Civil Rights Act of 1871, codified in relevant part as 42 U.S.C. § 1985(2), prohibits private conspiracies which may injure the "person or property" of a witness or party in a federal judicial proceeding. Consistent with the Reconstruction Era understanding of the terms "person" and "property," and consistent with the specific legislative intent behind the Act, the loss of "at-will" employment is an injury cognizable under both the "person" and "property" terms used in 42 U.S.C. § 1985(2).

In *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997), the Supreme Court set forth guidance on interpreting statutes:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning . . . The plainness or ambiguity . . . is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Id. at 846.

Applying this rule to the Civil Rights Act of 1871, 42 U.S.C. § 1985, the statute unquestionably protects "at-will" employees from retaliation or loss of employment as a result of testifying or participating in a federal proceeding covered under § 1985(2).

The statute prohibits private conspiracies to undermine "at-will" employment of witnesses or parties to federal proceedings. The plain meaning of "person or property" at the time the law was passed covers the right to sell one's labor. In

fact, the right to sell one's labor was an essential component of personal and property rights understood by the legislators in Reconstruction Congresses. Moreover, the Reconstruction Act Congressmen themselves directly pointed to the right to freely sell one's labor as fundamental to the Reconstruction laws. Therefore, interference with employment, "at-will" or otherwise, was prohibited under the core intent of the Civil Rights Act of 1871.

ARGUMENT

I. THE PLAIN AND UNAMBIGUOUS MEANING OF "PERSON" AND "PROPERTY" CONTAINED IN 42 U.S.C. § 1985(2) PROTECTS "AT-WILL" EMPLOYEES FROM RETALIATION.

A. The Lower Court in This Case Failed to Apply The *Robinson* Analysis.

This case concerns an interpretation of Section 2 of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2) (hereinafter §1985(2)), a Reconstruction Era civil rights statute.[2] The law prohibits private conspiracies against witnesses or parties in federal judicial proceedings. *See Kush v. Rutledge*, 460 U.S. 719 (1983).[3]

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[2] The statutory provision that is now codified as § 1985 of Title 42 of the United States Code was originally enacted as § 2 of the Civil Rights Act of 1871, 17 Stat. 13. *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). The present wording of § 1985(2) dates to the 1874 consolidation of the then widely scattered federal laws into the Revised Statues of the United States. Section 1980 of the Revised Statutes consolidated the Conspiracy Act of 1861, 12 Stat. 284, and the Civil Rights Act of 1871, 17 Stat. 13. The section at issue in this case, R.S. § 1980(2) is now, without change, 42 U.S.C. § 1985(2). In passing the 1874 Consolidation Act, Congress did not intend to change the meaning of the laws even though it made minor changes in language. At that time, Congress made it clear that discrepancies between the original acts and the Revised Statutes were to be resolved by consulting the original acts. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 344-45 (5th Cir. 1981), *cert. denied*, 454 U.S. 1100 (1981) (citing 20 Stat. 27 (1878)).

[3] Civil Rights Act of 1971 § 2, 42 U.S.C. § 1985(2) (Supp. III 1979). The pertinent text outlaws actions when:

> . . . two or more persons in any State or Territory

It is now well settled that in interpreting Reconstruction Era civil rights statutes, this Court accords them "a sweep as broad as [their] language."[4] Moreover, applying this Court's decisions on statutory construction,[5] as recently set forth in the unanimous opinion in *Robinson v. Shell Oil Co.*,[6] the lower court must be reversed.

In *Robinson*, the Court delineated a method of statutory construction in which determination of whether a term is ambiguous or not revolves around the context surrounding the term itself, its relation to the rest of the statute, and the broader context of the statute as a whole:

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conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified. . . .

[4] *See United States v. Price*, 383 U.S. 787, 801 (1966); *accord, Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

[5] The Court has a history of subjecting like statutes to similar methods of statutory construction that serve to advance the purpose of the statute. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) (stating, in interpreting tax laws, that "it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute"); *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856) (stating, in interpreting patent laws, that the court will not look merely to a particular clause, but will consider the entire statute and construe it to conform to the will of the legislature).

[6] *See* 519 U.S. 337, 340 (1997) (Thomas, J., construing term "employees" in context of §704(a) of Title VII of the Civil Rights Act of 1964 to include former employees, in light of broader context of Title VII as a whole, and the purpose of the specific anti-retaliation provision at issue).

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.[7]

Applying this rule to § 1985(2), the terms "person or property" contained in the law are not ambiguous and unquestionably encompass conspiracies to interfere with employment, "at-will" or otherwise.[8]

The statute at issue in this case, the Civil Rights Act of 1871, § 1985(2), protects the rights of witnesses and parties to

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[7] *Id.* (internal citations omitted).

[8] Significantly, the distinction between "at-will" and "non-at-will" employment would have been meaningless to the members of Congress who drafted the Civil Rights Act of 1871. As set forth in part II of this Argument, members of Congress were concerned about the right of persons to sell their labor freely on the open market. Whether this labor was performed on an hourly basis, with the right of either party to terminate the relationship at any time, or whether this labor was performed under the terms of a written contract which limited the employer's right to discharge an employee, was completely immaterial to the debates in Congress and the understanding of labor markets in 1871. Significantly, the "at-will" rule relied upon by the Respondents and the lower courts was first set forth in a treatise published in 1877, six years after the adoption of the Civil Rights Act. *Brockmeyer v. Dun & Bradstreet*, 335 N.W. 2d 834, 837 (Wis. 1983). It was not until after 1877, in the "late nineteenth century," that the "at-will" doctrine was articulated and adopted by various courts in this country. *Id.*

federal judicial proceedings.[9] In *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987),[10] the Eleventh Circuit ruled that a federal witness who had been fired from his job in retaliation for testifying in a federal judicial proceeding could not state a remediable claim under § 1985(2). In construing the term "property," the Eleventh Circuit prevented at-will employees from asserting a property interest, holding that such employees have no constitutionally protected property interest in continued employment. *Id.* This decision, however, failed to properly apply the *Robinson* analysis, and as a result, the decision of the Eleventh Circuit in the case at bar is infirm.

B. The Drafters of the Civil Rights Act of 1871 Understood the Right to Labor as Protected under Both the "Person" and "Property" Terms Used in 42 U.S.C. § 1985(2).

A proper understanding of the context in which the language of § 1985(2) is cloaked requires knowledge of the terms involved as they were originally intended. The key terms at issue in this case are "person" and "property," for it is injuries to these that create a right of action under the statute.

The term "person" was understood since the time of Blackstone to include two distinct types of persons. The law

[9] *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

[10] *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) (holding that a complainant failed to properly state a claim because "at-will" employees have no constitutionally protected property interest in their continued employment. Significantly, the lower court in this case relied upon *Morast* in deciding the case at bar).

divided persons into "natural" and "artificial" persons.[11] The earliest notions of rights flowed from this distinction, and it is from them that lawmakers at the time of the enactment of § 1985(2) gained their understanding of the terms relevant to this case. Significantly, two of the leading law dictionaries of the time, produced expressly for lawmakers, stood in accord with Blackstone's exposition.[12]

Blackstone explained the manner in which rights attached to one's status as a natural person, classifying rights as either "absolute" or "relative":

> There are two classes of rights, absolute and relative. Absolute rights are those such as appertain and belong to men merely as individuals or single persons. (They are) those which are so in their primary and strictest sense. Relative rights are those which are incident to them as members of society.[13]

[11] *Tucker's Blackstone's Commentaries*, Book 1, § 1. Wherein Blackstone posited that:

> [P]ersons are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.

[12] *See, e.g.*, 5 *Jacob's Law Dictionary*, 144 (1811) (Repeating Blackstone's maxim, verbatim); 2 *Bouvier's Law Dictionary* 326 (1868) (defining "person" similarly: "The term is more extensive than man, including artificial beings, as corporations, as well as natural beings.")

[13] *See* 1 *Blackstone: Commentaries on the Laws of England*, Book 1, § 1, (Williams S. Hein & Co., 1992).

Within the realm of personal security was a natural person's right to their reputation.[14] That this idea was accepted in America is evidenced in the vast body of law which has come today to be called the law of defamation. During the time prior to and surrounding the enactment of the Civil Rights Act of 1871, defamation in the form of either libel or slander was a widely accepted cause of action, for injuring a person's right to their reputation. This cause of action grew over time from a simple tort to one which included the notion of "slander *per se*" for injury to a person's reputation.[15]

Significantly, damages to reputation were recoverable *because* they impacted on the personal right to engage in a "trade"[16] or earn a "livelihood." *Id.* Wrongful action which rendered a person "unworthy of employment,"[17] such as slander, was included in the penumbra of personal injuries widely recognized in 1871 in the definition of injury to person.

Based upon this rich history, chronicled and enlivened by Blackstone, the lawmakers who drafted and enacted the Civil Rights Act of 1871 understood "person" to include a

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[14] *See Tucker's Blackstone's Commentaries,* Book 4, Chapter 8, Number 3 (recognizing that damages to a man's reputation under the common law action for slander are recoverable because they harm that individual's trade or livelihood); *Kent's Commentaries, Volume II,* (stating as a "part of the right of personal security, the preservation of every person's good name. . . is justly included . . . when . . . [the charge] would render him unworthy of employment.")

[15] *See, e.g., Kelly v. Huffington,* 3 Cranch 81, Federal Case No. 7,671 (1827) (creating a cause of action for imputations injurious to a man's profession or business); *Brown v. Orvis,* 6 How. Prac. 376 (1851) (recognizing that terms which inherently injure one's business or trade are effectively slanderous, *per se*).

[16] *See Tucker's Blackstone's Commentaries, supra,* note 11.

[17] *See Kent's Commentaries, supra,* note 11.

natural person with the right to, and an interest in his ability to, earn a "livelihood" by gaining "employment." Congress must, then, have understood an injury to one's person to necessarily include an injury to one's ability to work. And this is precisely where the court in *Morast* and the lower court here failed. They neglected to follow *Robinson* and understand the terms of § 1985(2) in context, as the drafters of the statute understood them.

Likewise, the term "property" developed a common meaning in America as a result of the writings of Blackstone and others. Blackstone's third absolute right was that of property:

> Which consists in the free use, enjoyment, and disposal of all one's acquisitions, without any control or diminution, save by the laws of the land.[18]

From the notion of property arose the idea that a person's labor is their property. This is reflected, again, in the legal dictionaries created for lawmakers of the time.[19] That the legislators of the time were aware of this definition of labor as property is reflected in the Supreme Court's fractured opinion in the *Slaughter-House Cases*, 83 U.S. 36 (1872), where, though the Court could not reach a strong majority on the case at hand, both sides were able to agree that a person's property right included the right to labor freely.[20]

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[18] *See Blackstone, supra,* note 11, at Number 3.

[19] *See Jacob's Law Dictionary, supra,* Vol. 4, at 66.

[20] *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, (1872). Significantly, this 5-4 decision included 3 separate dissenting opinions in which the dissenters agreed with the majority as to the nature of a person's right to property, including property in their labor.

The majority opinion in *Slaughter-House Cases* recognized that the Reconstruction Era Congresses were concerned about the right of the newly freed slaves to obtain *employment*, whether as an "at-will" employee or as a contract employee. The majority noted that the post-Civil War Congress was very concerned that former slaves were "excluded from many occupations of gain" and recognized that these exclusions impacted fundamental rights of "life, liberty and property to such an extent that their freedom was of little value."[21]

Justice Swayne, in his dissent, explicitly recognized that, during the Reconstruction Era, it was widely recognized that "labor is property, and as such should be protected."[22]

Justice Field, also in dissent, quoted Adam Smith, for the proposition that "the property which every man has in his own labor at is the foundation of all other property, so it is the most sacred and inviolable."[23] This completes an interesting cycle which begins with Blackstone, runs through the legal dictionaries of the time, to contemporary case law and Supreme Court commentary, and finds its source back in the writings Smith.

This is a rich tradition which clearly influenced, colored, and determined how Congress thought about the terms they included in the Civil Rights Act of 1871. It is only through an understanding of this tradition that a court can properly apply the *Robinson* framework and accurately construe § 1985(2) according to the intent of the original framers.

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[21] *Id.*, at 70.

[22] *Id.*, at 127 (Swayne, J. dissenting).

[23] *Id.*, at 111 (Bradley, J., dissenting) (citing *Smith's Wealth of Nations*, Book 1, Chapter 10, Part 2).

As forcibly articulated by the respected legal treatises widely utilized in or about 1871, there was a strong and overriding consensus that the right to obtain employment, "at-will" or otherwise, was a fundamental personal and property right. When Congress used the words "person" and "property" in the Civil Rights Act of 1871, they intended to protect witnesses in and parties to federal proceedings from retaliation in employment, "at-will" or otherwise.

II. 42 U.S.C. § 1985(2) SHOULD BE INTERPRETED CONSISTENT WITH ITS LEGISLATIVE INTENT IN LIGHT OF THE INCONSISTENCY CREATED BY THE LOWER COURTS.

Regardless of whether this Court finds the language of § 1985(2) ambiguous, it should still evaluate the statute within the context of the Civil Rights Act of 1871 to remedy the inconsistent statutory scheme created by the lower court. This Court looks to the "primary purpose" of legislation as a guide to its meaning. *Robinson v. Shell,* 117 S.Ct. 843, 848 (1997). Section 1985(2) is derived from the Civil Rights Act of 1871. The legislative history of that Act, therefore, is a useful "tool of analysis" for interpreting § 1985(2). *Garcia v. United States*, 469 U.S. 70, 75 (1984).

A. Congress Intended to Provide a Remedy for Witnesses and Parties to Federal Proceedings Who Are Denied the Right to Sell Their Labor as a Result of Private Conspiracies.

The legislative history of the Reconstruction Era civil rights laws, including the history of the Civil Rights Act of 1871, unquestionably supports the proposition that the right to sell one's labor as an employee, "at-will" or otherwise, was intended to be protected under § 1985(2).

In debates on the predecessor law to § 1985(2), the

Civil Rights Act of 1866,[24] Congress intended to protect the freedom of the newly emancipated slaves to sell their labor on the free market. In fact, the right to sell labor, whether under a written contract or as an "at will" employee, was at the heart of the liberty interests Congress intended to protect through the Reconstruction civil rights laws. For example, Congressman William Windom (R-Minn.) stressed the importance of the freedom to work:

> Do you call that man free who cannot choose his own employer, or name the wages for which he will work? Do you call him a freeman who is denied that most sacred of all possessions, a home? Is he free who cannot bring a suit in court for the defense of his rights? Sir, if this be liberty, may none ever know what slavery is.

Cong. Globe, 39th Cong., 1st Sess. 1160 (1866).

Later in the debate, Congressman Martin Russell Thayer (R-Pa.) stated:

> [L]aws which impair [the emancipated slaves'] ability to make contracts for labor in such a manner as virtually to deprive them of the power of making such contracts, and which then declare them vagrants. . .because they have no employment; . . . I demand to know, of what practical value is the amendment to abolish slavery in the United States?

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[24] The court has looked at the "events and passions of the time" and the "context" in which Congress enacted the Reconstruction laws as a guide to interpreting the Reconstruction Era Civil Rights statutes. *United States v. Price*, 383 U.S. 787, 803-4 (1966).

Id. at 1151.

The legislators who passed the Civil Rights Act of 1871 also recognized that selling one's labor, whether as an "at will" employee or not, was one of the fundamental rights of property and person which were intended to be protected under the 1871 law. For example, Senator James Kelley (D-Or.) stated:

> [The emancipated slaves'] deplorable condition is the result of the infernal system of slavery, which denied wages to the laborer, and so robbed toil of the dignity and aspirations and capital of its just rewards . . . The outraged colored people of the South have earned the dollars, grown the cotton, the tobacco, the rice, cut the timber, built the factories, to which the gentleman from Tennessee [Mr. Whitthorne] referred; and shall they enjoy none of them?

Cong. Globe, 42nd Cong., 1st Sess. 338, 340 (1871).

Moreover, Congress recognized that one of the core provisions of the Civil Rights Act of 1871 was the protection of employment, "at-will" or otherwise, of both the newly-freed slaves and white persons of the South. The personal and property rights of persons covered under § 1985(2) included the right to "steadiness of employment." Senator Kelley, on the floor of the Senate, stated:

> The sooner they quicken into fruition the hopes, aspirations, and energies of the blacks and the poor whites of the South, by giving them steadiness of employment, by inviting to their midst capital to advance industrial enterprises, the sooner will they enjoy peace and safety and a measure of prosperity which no part of the South has ever enjoyed.

Id. at 341.

Mr. Kelley also told the story of two young farmers from Pennsylvania "without politics or political affiliation" who were murdered after attempting to establish a farm in Mississippi. *Id.* Mr. Kelley reported that "[t]he neighbors who had annoyed them to that time would not permit them to enjoy the fruits of their labor." *Id.* Thus, the Civil Rights Act of 1871 was enacted to protect the basic right of all people, whether they be former slaves or northern farmers, to enjoy "the fruits of their labor."

These comments by the legislators who passed the Civil Rights Act of 1871, later encoded in relevant part as § 1985(2), indicate that Congress intended to protect the most basic of all freedoms, the freedom to sell one's labor in the open market.[25] Congress was spurred to act in defense of this freedom as a result of the numerous private conspiracies which worked to

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[25] The intent of Congress to prohibit conspiracies against the private employment of persons covered under the Civil Rights Act of 1871 is also clearly indicated in debates on portions of the Act which concern state action, as opposed to purely private conspiracies. For example, Congressman Wilson declared unequivocally that a state law that penalized an employer for hiring a certain class of persons would be unconstitutional:

> There are fundamental rights or privileges, and no State has any right by its laws to deny them. Suppose, now, that a State should pass a law authorizing slavery, or denying the right to vote to persons of color, or, as I blush to say was the case in the State of Indiana, forbidding a certain class of persons from entering the State, and forbidding under heavy penalties any one from giving employment to any such person . . . this would be a deprivation of constitutional right and privilege. The State has no right to pass any such law.

Cong. Globe, 42nd Cong., 1st Sess. 481 (1871).

destroy the exercise of this freedom.

Senator Thomas Ward Osborn (R-Fla.) brought home the point that the Civil Rights Act was necessary to secure the rights guaranteed by Thirteenth and Fourteenth Amendments:

> What shall we do to maintain order and to punish the guilty in a community where a large proportion of the people are bound together by oaths and obligations, having pass-words, signs of recognition, and whose well-defined and clearly-proven object is to gain political control by intimidation and murder.

Cong. Globe, 42nd Cong., 2nd Sess. 653 (1871).

When drafting the Civil Rights Act of 1871, Congress interviewed hundreds of witnesses and complied a 13 volume Senate report numbering more than 7000 pages.[26]

Witnesses at the Senate Hearing testified to the Ku Klux Klan's power in Alabama, North Carolina, South Carolina, Mississippi, Florida, Georgia, and Louisiana. *Id.* Railroad contractor William Howle from North Carolina was driven out of business and forced into bankruptcy after Klan members threatened workers who helped with his construction. Howle, who needed 30 to 40 workers at each contract site, could find no workers willing to work for him at any of his sites after Klan members threatened and whipped workers who did show up. *Id.* at 51. The county magistrate refused to press charges, and Howle was eventually driven to bankruptcy and forced to leave the state. *Id.*

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[26] *Testimony Taken by the Joint Selection Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42nd Legis., 2nd Session (1871-82).

Mechanic James M. Justice told Congress that he withdrew as a juror in a case against a Klan member because Klan members threatened to kill him unless he gave way for other "Klan affiliated" jurors. *Id.* at 110. Alabama Probate Judge William Blackford and US District Judge of Alabama Richard Busteed testified that juries in Alabama were rigged so that no member of the Klan could ever be convicted. When Judge Blackford complained to state officials, Blackford was told to resign if he was unhappy. *Id.* at 320-30, 1274-76.

The gravamen of this history is that at the time Congress drafted the Reconstruction statutes, it expressly sought to prevent the economic and social destruction of individuals by private conspiracies. Although the witness statements from the Senate Hearings are extreme, they differ only by degree from the type of retaliation experienced by Mr. Haddle. Mr. Haddle was fired as a result of his willingness to testify against his employer. As evidenced by the legislative history, Congress was well aware of the use of hiring boycotts by conspirators to harass or intimidate those with whom they disagreed.[27] The result of the private conspiracies, however, is the same, regardless of whether the individual is precluded from being hired or is fired: The person is denied his right to sell his labor on the open market.

B. Congress Intended to Uphold the Integrity of the Judicial Process.

The policy and intent behind the creation of § 1985(2) supports protection of the judicial process in order to ensure complete and equal access to the laws, rights, and protections granted to every citizen of the United States. Only through

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[27] *Testimony Taken by the Joint Selection Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42nd Legis., 2nd Session (1871-82), at 51.

unobstructed access to every aspect of the judicial process can citizens be protected under the law[28].

This Court has expressed the importance of protecting the sanctity of the judicial process by ensuring complete access to a fair trial. In *Estes v. Texas*, 381 U.S. 532 (1965), the Court reversed a criminal conviction on the grounds that the media interfered with the defendant's right to a fair trial:

> We have always held that the atmosphere essential to the preservation of a fair trail -- the most fundamental of all freedoms -- must be maintained at all costs.

Estes, 381 U.S. at 540. In *Nye v. United States*, 313 U.S. 33 (1941), the Court reversed a decision to dismiss an action after it found that the plaintiff was improperly persuaded to dismiss his claim:

> The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. . . . We may concede that there was an obstruction in the administration of justice.

Nye, 313 U.S. at 52 (1941).

The Respondents in the present case interfered with the judicial process by punishing Mr. Haddle for preparing testimony in a court of law against them. If this court does not

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[28] *Cong. Globe*, 39th Cong., 1st Sess. 1160 (1866)(Remarks of Rep. Windom)("Do you call that man free who cannot. . . . bring a suit in court for the defense of his rights? Sir, if this be liberty may none ever know what slavery is.")

reverse the lower court's holding in this case, the effect will be to allow the Respondents to obstruct the judicial process and destroy the necessary "atmosphere" surrounding a fair trial. Threatening an "at-will" employee's job, or terminating "at-will" employees from work, in retaliation for testifying in federal judicial proceedings will create an atmosphere of intimidation destructive to the judicial process. This is precisely the harm that Congress sought to prevent in passing Section 2 of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2).

As Justice Stevens pointed out in *Wilson v. Garcia,* 471 U.S. 261, 276 (1985):

> The specific historical catalyst for the Civil Rights Act of 1871 was campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights.

Justice Stevens remarked on the goal of the Act: "By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement." *Id.* at 277.

Again, the legislative history of the Reconstruction Era civil rights laws document the Congressional concern over judicial integrity. In debating the 1866 Civil Rights Act, Congressman Thayer questioned the practical value of the 13th Amendment if the right to justice is not enforced:

> What kind of freedom is that under which a man . . . may be deprived of the right to be a party or a witness in a court of justice, or may be subjected to pains and penalties which are not inflicted upon other citizens?

Cong. Globe, 39th Cong., 1st Sess. 1152 (1866).

The legislative history of the Civil Right Act of 1871 indicates the Congressional intent to uphold the integrity of the judicial system. Congressman John Sherman (R-Ohio) stated:

> The point I wish to get at is this: it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.

Id. at 345.

Senator Osborn most passionately questioned the viability of the 13th and 14th Amendments if emancipated slaves had no protection from private conspiracies that were otherwise determined to obstruct the justice of equal protection under the law. He stated:

> What can we do when such men are allowed to crowd each other forward upon juries and upon the witness-stand, with no purpose or object but to swear to truth or falsehood, to condemn or to acquit as may best advance the interests of their order? Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice.

Cong. Globe, 42nd Cong., 2nd Sess. 653 (1871).

The case at bar concerns allegations of a private conspiracy to undermine the employment of Mr. Michael A. Haddle because Mr. Haddle was a known witness in a federal proceeding against persons who engaged in criminal activities

and violated federal criminal laws. Any interference with Mr. Haddle's right to sell his labor and his right to obtain or retain employment, as an "at-will" employee or otherwise, was strictly prohibited under the core intent of the drafters of the Civil Rights Act of 1871.

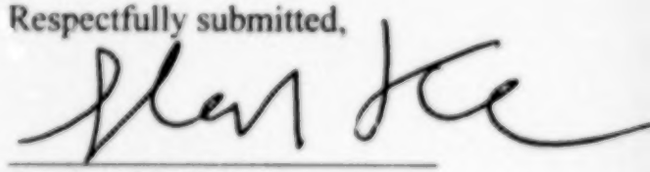
These legislators were imbedded with the anti-slavery principles premised upon the right of all persons to sell their labor freely on the open market. Whether the labor was sold through a written contract for a duration of time (i.e., "non-at-will") or was sold on an hour-to-hour basis at the pleasure of either the employee or the employer (i.e., "at-will" employment) was strictly immaterial. The right to sell labor was viewed as a fundamental component of a personal rights and/or property rights explicitly protected under § 1985(2).

The authors of § 1985(2) were fully aware that destroying a person's ability to obtain employment as a result of his or her participation as a witness or party in a federal proceeding would undermine the federal judicial process and undermine the laws of the United States. Under *Robinson*, 117 S.Ct. 843, § 1985(2) prohibits private conspiracies which interfere with the "at will" employment of witnesses or parties to federal proceedings.

CONCLUSION

For the foregoing reasons, this Court should uphold Petitioner's argument and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,



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No. 97-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The National Employment Lawyers Association moves for leave to file a brief as *amicus curiae*. The issues to be decided herein affect the interest of this organization, its members, and their clients as set forth in the statement of interest of the accompanying brief.

We have obtained letters of consent from the petitioner and four of the five named respondents; however, we have been unable to obtain a letter of consent from respondent Dennis Kelly. Barry J. Armstrong, counsel for Jeanette G. Garrison, Christopher Garrison, and Healthmaster, Inc., informed us that Kelly is currently serving a jail sentence and has not been actively involved in the litigation of this case. Michael Pascual of the National Whistleblower Center (NWC), another organization filing an *amicus* brief in this case, then informed us that he located Kelly at the Effingham County Jail in Springfield, Georgia, but that Kelly withheld consent to the filing of NWC's brief. Paula Brantner, my cocounsel on this brief, contacted the Effingham County Jail and verified that Kelly was imprisoned there; however, as of the time of this filing, Kelly had not returned Ms. Brantner's call or granted consent to this filing.

MARK ALLEN KLEIMAN

Dated: July 24, 1998

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INTEREST OF THE AMICI CURIAE[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in employment, labor, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law issues. Some recent cases before this Court include: *Faragher v. City of Boca Raton*, U.S.Sup.Ct. No. 97-282, 66 USLW 4643 (decided 6/26/98); *Burlington Industries v. Ellerth*, U.S. Sup.Ct. No. 97-569, 66 USLW 4634 (decided 6/26/98); and *Oncale v. Sundowner Offshore Services Inc. et al.*, 118 S.Ct. 998 (1998). In addition, NELA and its state and local affiliates have participated as *amici* in cases involving whistleblower issues before state courts.

NELA members have brought numerous cases under the Reconstruction era civil rights laws, as well as whistleblower cases under state law. In fact, NELA members have devoted an active committee to discussing developments in the area of whistleblower protection laws.

This decision represents a tremendous limitation on at-will employees who cooperate in federal investigations of their employer's wrongdoing. The Eleventh

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[1] No counsel for a party authored this brief in whole or in part. No persons other than the *Amici Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

Circuit's holding essentially allows employers to stifle such cooperation by firing, or threatening to fire, at-will employees under these circumstances. Employee witnesses, who may otherwise assist the federal government in investigations, will be chilled from doing so, for fear of retaliation. Among the anomalous results will be that the targets of government investigations will be able to suppress probative evidence by precluding witnesses' testimony before federal courts. Employees will then be forced to choose between upholding the law or keeping their jobs. NELA submits this brief to address these concerns of law and policy. In so doing, NELA seeks to protect the interests of its members and their clients, by helping to ensure that the goals of the Civil Rights Act of 1871 are fully realized.

The Government Accountability Project (GAP) is a non-profit, non-partisan public interest law firm started in 1978 to provide support for whistleblowers, those employees who challenge illegality or other institutional misconduct undermining the public interest that they discover in the course of their employment. GAP assists whistleblowers by counseling and diagnosing legal options for those who seek help; legally representing whistleblowers who exercise free speech rights to defend themselves against retaliation; representing whistleblowers to be more effective in challenging institutional misconduct that they disclose; helping to defend and strengthen whistleblower laws; sponsoring legal and public education conference on whistleblowing; and authoring publications ranging from survival manuals to law review articles. *See, e.g., A Whistleblower's Guide to the Federal Bureaucracy* (1977); and *the Whistle-*

blower's Survival Guide; Courage Without Martyrdom (1977).

As part of GAP's mission, the organization led the successful campaign to pass the Whistleblower Protection Act of 1989, for federal civil service employees. GAP has actively participated in coalitions to defend that law, related statutes such as the False Claims Act, and associated constitutional rights, including participation in television and print media debates, congressional outreach and litigation in test cases significant for occupational free speech rights.

INTRODUCTION & SUMMARY OF ARGUMENT

Recent years have seen increasing concern over public corruption and white collar crime. It has become commonplace for the United States to devote major investigative and prosecutorial resources to preventing, deterring, and punishing criminal or fraudulent conduct. In the health care field alone, Congress has devoted hundreds of millions of dollars to law enforcement efforts to stem fraud and abuse. Although law enforcement organizations and agencies concerned with public safety commonly call on citizens to come forward with information about wrongdoing, those agencies can do little to protect the truthful employee from retaliation for bringing fraud or abuse to light. Employees have been, and continue to be, terminated for seeking to protect the integrity of public programs, the safety of patients, and the like.

What makes these terminations particularly insidious is that they strike fear into the hearts of those most likely to be in a position to expose criminal schemes. Honest employees are thus forced to choose between upholding the law and retaining their jobs. This is all the more troubling since some statutes (e.g. 31 U.S.C. § 3729 et seq.) not only protect such employees from retaliation, but actually reward them with a share of the government's recovery from law-breaking entities. Respondents' construction of the law would mean that employees who bring *qui tam* actions are protected and rewarded, while those who do not seek to profit from their employer's wrongdoing are exposed to retaliation without any protection. In essence, Respondents claim that at-will employees may be denied their federal rights to cooperate with law enforcement and to testify in judicial proceedings without retaliation. Upholding the Respondents' position would chill at-will employee witnesses by allowing unfettered retaliation against those who cooperate. This flies in the face of public policy and constitutional law as enunciated by this Court in *United States v. Nixon*, 418 U.S. 683 (1974), which upheld the need for public confidence in the integrity of the judiciary, even as against claims of executive privilege.

Public policy overwhelmingly favors the right of employees to testify without such fear, so that the government may have the benefit of their testimony in federal law enforcement proceedings. This is the only result, and the one that we urge this Honorable Court to embrace, that is consistent with the express language and the history of Section 1985(2).

LEGAL ARGUMENT

A. This Nation's Public Policy Granting Citizens Their Right of Access to the Courts Is Easily Discerned and Indisputable.

1. 42 U.S.C. § 1985(2) Was Rooted in the Need to Protect Federal Witnesses.

Provisions of the Civil Rights Act of 1871 that protect access to federal courts encompass activities which are intimately linked to the essence of our government and are thus vigilantly protected.[2] One of the key civil rights "is the right to testify at a federal trial in response to a request or command of a federal district court. Our federal government has a particular interest in assuring a prospective witness that he or she will be free to respond by attending the trial of a federal indictment as a witness without being prevented from doing so by threats, molestation, or force. Otherwise, the foundations of federal justice would be undermined."[3]

McCord v. Bailey, 636 F.2d 606, 615-617 (D.C. Cir. 1980), set forth the legislative history of the statute in a manner which this Court, in *Kush v. Rutledge*, 460 U.S. at 726-727, noted was accurately and persuasively recounted. It is clear that Congress intended what has become Section 1985(2) to protect the judicial process itself, and to preserve the rule of law. The act was not aimed solely at protecting civil rights, but was also intended to ensure the orderly operation of government.

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[2] *Kush v. Rutledge*, 460 U.S. 719, 722-724 (1983). (This was another case brought under 42 U.S.C. § 1985(2) involving alleged intimidation of a federal witness.)

[3] *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974).

2. Access to the Courts Is of Paramount Importance Under Our Constitution.

In *United States v. Nixon*, 418 U.S. 683 (1974), this Court was called on to weigh the Presidential privilege against the needs of the judicial process. President Nixon raised Presidential privilege against disclosure of confidential communications which had been preserved on tape. This Court held that the fundamental demands of due process of law in the fair administration of justice required that the Presidential privilege yield to the specific need for evidence in a pending case. This Court said:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." (Citation omitted.) We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

418 U.S. at 708-709.

This Court went on to stress the importance such evidence has historically enjoyed under the Constitution:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

United States v. Nixon, 418 U.S. at 711.

Just as a President's need for secrecy must yield to the demands of justice to develop all facts in an adversary system, an employer's wishes to fire those who obey federal subpoenas must yield to the duty of the courts to secure relevant evidence, and protect those responding to compulsory process.

B. The Legislative History of Section 1985 Shows That It Was Intended to Protect the Enjoyment of Life and Liberty, with the Right to Acquire and Possess Property of Every Kind.

This Court has previously recognized that the history of Section 1985 establishes Congress' intent to secure "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to

pursue and obtain happiness and safety."[4] President Grant, in a message to Congress, called for passage of the Act to "effectually secure life, liberty, and property, and enforcement of law in all parts of the United States."[5]

Thus, numerous courts have recognized that where 42 U.S.C. § 1985(2) has been violated, tort damages are available in the employment context even though there is no constitutionally protected interest in a job.[6] Similarly, the Tenth Circuit has held that a crop duster who alleged that his bid for a contract was rejected because of a prior lawsuit sustained a cognizable injury.[7]

1. The Eleventh Circuit Misconstrues the Law and Is Out of Step with the Weight of Decisional Authority.

The Eleventh Circuit has confused a statutory and constitutional right of access to the courts, free of retaliation and intimidation, with a contractual obligation. The Eleventh Circuit erroneously maintained that, since an at-will employee has no constitutionally protected interest in employment, he may be subjected to

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[4] *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545-546 (1972).

[5] *Id.*, at 546.

[6] *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983); *Portman v. County of Santa Clara*, 995 F.2d 898, 909-910 (9th Cir. 1993).

[7] *Wright v. No Skiter Inc.*, 774 F.2d 422, 425-426 (10th Cir. 1985).

retaliation or intimidation for exercising his right of access to the courts. This is mistaken, for it confuses the triggering event (retaliation for attending federal court) with the source of damages (loss of a job).

In deciding *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), the Eleventh Circuit miscomprehended the nature of the rights to be vindicated and the events which trigger application of a Section 1985(2) analysis. Unlike Section 1985(3), which prohibits class-based interference with federally recognized and protected civil rights interests, Section (2) prohibits interference with access to the federal courts. Although a Section 1985(3) analysis may legitimately consider whether the right allegedly invaded is one which is protected by the Constitution, the Section (2) right of access to the federal courts is taken as a given. Freedom of contract and at-will employment are not implicated by a Section (2) analysis of whether or not a federal right has been invaded.[8]

2. That an Employee May be Subject to "At-Will" Termination Does Not Permit a Firing in Violation of Federal Law.

That a state's laws permit at-will termination of employees does not mean that a Georgia employer is free to violate federal law. The at-will employment

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[8] Testifying in a federal trial is a right protected by the Constitution. Absent this right, the very foundations of justice would be undermined. *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir. Unit B, 1982); *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1973).

doctrine does not, after all, permit an employer to fire a woman because of gender bias or an Asian because of racial bias. Nor does it permit the firing of an employee for complaining of such bias to the EEOC.[9] Thus, the Eleventh Circuit erred in *Morast*, and erred here, in concluding that, since there is no constitutional right to employment, there need be no examination of whether a 1985(2) violation had occurred. In a 1985(2) analysis, the triggering event is interfering with or punishing access to the federal courts. Once that occurs, as *Irizarry* points out, if a defendant's actions fall within the prohibitions of section (2), this may trigger liability for "any economic damage that would be recognized in an ordinary tort suit."[10]

3. Sections 1985(2) and (3) Protect Witnesses, Not Just Parties, From Intimidation and Retaliation.

Although the Respondents acknowledge, as they must, that access to the courts is protected by the Act, they also claim that this means access only for parties, and not for witnesses. This is incorrect. Section 1985 protects access to the courts for witnesses and parties alike. The operative language from Section (2) states that:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely,

[9] 42 U.S.C. § 2000e-3.

[10] *Irizarry v. Quiros*, 722 F.2d 869, 871 (1983).

> fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified. . .[11]

Clearly, both parties and witnesses are to be protected from intimidation. Respondents, however, have made overly much of the fact that Section (3) refers only to parties. However, the term "parties" in Section (3) is employed in a way wholly different from that in Section (2), with the result that the phrase "party" in Section (3) refers to a party who has been injured by a act prohibited by any section of the law. Section 1985(3) states:

> [I]f two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The text of Section (3) states that the "party so injured or deprived" may sue for damages. But this section also prohibits threats or intimidation against any "citizen" who is entitled to vote. That someone is a voter, supports a candidate, or advocates for a political party does not make them a "party" in the limited sense of having merely participated in a lawsuit. Yet these

[11] 42 U.S.C. § 1985(2).

persons, too, are expressly protected by Section (3). The only conclusion possible is that the phrase "the party so injured" means the person so injured. Otherwise, the reference to voters and campaigners would be meaningless. Since to be a "party" referred to in Section (3) does not require that one be a "party" to an action, a witness as defined in Section (2) who suffers intimidation or retaliation is a "party so injured" within the meaning of Section (3).

Brever v. Rockwell International Corp., 40 F.3d 1119 (10th Cir. 1994), correctly reached this conclusion, pointing out that the narrow reading of "party" cannot be correct where the preceding portion specifically refers to witnesses as protected persons. In a case exactly like the present one, the court points out that in "a federal grand jury proceeding . . . the only 'party' according to defendants' interpretation of the statute would be the United States."[12] The court added, "To succeed on a retaliation claim, Ms. Pitts must allege a conspiracy, a nexus between the conspiracy and her grand jury testimony, and injury on account of having testified."[13] Petitioner, or any employee meeting the test, should be permitted to proceed.

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[12] *Brever*, at 40 F.3d 1119, 1125-1126, n.7.

[13] *Id.*, at 1129.

C. Without Clear Protection Under Section 1985(2) the Rights of Employees Will Depend on the Vagaries of Geography and Circumstance.

The desperate need for employee protection in the face of retaliatory firings by federal contractors and vendors is exceeded only by the confusion over what kind of reports, of what types of wrongdoing, are actually protected. Consider the anomalies in the health care field alone, unless this Court reverses the Eleventh Circuit's decision. Absent section 1985(2) protection, an employee who discovers fraud against the Medicare program may file a *qui tam* action against a provider and will be protected from retaliation.[14] Yet that same employee, testifying in federal court about the same fraudulent scheme perpetrated against private insurers or against a program funded by local government, is not protected unless he or she enjoys protection under a particular state whistleblower statute.

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[14] 31 U.S.C. § 3729 et seq. Specifically, "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection." 31 U.S.C. § 3730(h).

Imagine two persons employed by DSM Corporation, "Employee A" in Georgia, and "Employee B" in New Jersey, both discover that DSM is defrauding private insurers such as Aetna or Blue Cross. The Department of Justice, under the Health Insurance Portability and Affordability Act, convenes a grand jury to investigate DSM's wrongdoing.[15] Both employees are called before the grand jury, and both are fired. Under Respondents' construction of the law, DSM's Georgia employee is without a remedy, while the New Jersey employee will be protected by that state's Conscientious Employee Protection Act.[16]

Now imagine another Georgia employee, "Employee C", who files a *qui tam* action alleging that DSM has defrauded the Medicare or Medicaid programs in exactly the same way. Now, under Respondents' construction, "Employee A", who testified about fraud against a private program, is unprotected, "Employee C", who testified about that same fraud, but against a public program, *is* protected, and "Employee B", who testified about private fraud, but is in a different state, is also protected. The very absurdity of these results highlights why this Court must give full effect to the law as Congress intended—and must ensure a private right of action for any employee fired or retaliated against for seeking access to the federal courts.

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[15] 18 U.S.C. § 1347 et seq.

[16] N.J. Stat. Ann. 34:19-1 et seq.

CONCLUSION

The courts need to uphold the right of all citizens to come before them without fear of punishment for doing so. If the courts ensure that this right is protected, we can all have confidence that matters are decided with full and complete information, and that witnesses have freely and fully testified without fear for themselves and their families.

Amici ask this Court to reverse the decision of the Eleventh Circuit and so uphold the right of employees to have access to federal courts.

Respectfully submitted,

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APPENDIX

Pending State Whistleblower Protection Legislation

The confusion and desperation of employees struggling to protect their livelihood while remaining faithful to the law has driven an avalanche of state legislation. A bill introduced in the Alabama legislature would prohibit discrimination or retaliation against health care workers who report unsafe conditions or practices.[1] Two bills introduced in the Connecticut State Senate would extend whistleblower protection to employees of large state contractors and to foundations which support or assist state agencies.[2] The Hawaii legislature is considering three bills that would expand whistleblower protections by lengthening the statute of limitations, increasing penalties for violators, and strengthening the remedies available to whistleblowers.[3] Other proposed Hawaii legislation would expand the areas of protected conduct and reportable violations.[4] Three Michigan bills would protect employees who report violations of state law, threats to public health, safety or welfare, or participate in court actions.[5] The New Hampshire legislature similarly considered legislation to authorize com-

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[1] 1998 AL H.B. 1931.

[2] 1998 CT S.B. 457, 1998 CT S.B. 459.

[3] 1997 HI H.B. 689, 1997 HI H.B. 812, and HI S.B. 2240 (introduced January 26, 1998).

[4] 1997 HI S.B. 2423, and 1997 HI S.B. 3247 (both introduced February 2, 1998).

[5] 1997 MI H.B. 4027, 1997 MI H.B. 5263, and MI S.B. 42.

pensatory damages and attorneys fees for whistleblowing employees.[6] New York and Washington state considered legislation which would increase protections for public sector whistleblowers.[7]

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[6] 1997 NH H.B. 1662.

[7] 1997 NY A.B. 918, NY S.B. 445; and 1997 WA H.B. 1995, WA H.B. 5790.

ORIGINAL

(18)

(15)

No. 97-1472

Supreme Court, U.S.
FILED
SEP 9 1998
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In The
Supreme Court of the United States
October Term 1997

Michael A. Haddle,
Petitioner,

v.

Jeanette G. Harrison, et al,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals For the Eleventh Circuit

Adoption of Brief of Amicus Curiae
National Whistleblowers Center
By Respondent Harris Kelly

Harris J. Kelly, pro se
P.O. Box 579 LA-2
FCC Coleman Low
Coleman, FL 33521

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SEP 14 1998
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SUPREME COURT, U.S.

Adoption of Brief of Amicus Curiae
National Whistleblowers Center, with clarifications
for the Court, by Respondent Dennis Kelly

Now comes Respondent, Dennis J. Kelly, pro se, and adopts the brief of Amicus Curiae National Whistleblowers Center with the following clarifications for the Court.

1) Respondent Kelly was indicted along with Respondents Garrison and Healthmaster in a 133 Count Federal indictment alleging a conspiracy to defraud the United States, false statements, mail fraud, embezzlement, bank fraud, obstruction of a federal audit, money laundering and criminal forfeiture. After a short trial, at which Respondent Molloy, Respondent Garrison and Petitioner Haddle all testified for the government, Respondent Kelly was, not surprisingly, convicted of 117 counts and sentenced on October 31, 1995 to 151 months in prison, a $75,000 fine, criminal forfeiture of $934,850.02, restitution of $710,118 to Garrison controlled corporations, $5,750 in court costs and three years supervised release. U.S. v. Sutton, 132 F3d 662 at 665, 11th Cir, 1998. The sentence is currently on appeal in the Eleventh Circuit, and Kelly is incarcerated. Molloy, then chief in-house legal counsel for Healthmaster, was not prosecuted. Garrison was allowed to plead guilty to false statements, despite what the prosecution considered "overwhelming evidence" of her guilt to all charged counts, in exchange for a promise to testify against her former employer, Respondent Kelly.

2) Respondent Kelly, then chief financial officer for Healthmaster, was terminated on March 10, 1995 by Garrison and others as part of a subterfuge to exculpate Molloy, Garrison and others by shifting blame to Kelly. Petitioner alleges a conspiracy to bring about his discharge in order to effectuate retaliation against him. But Respondent Kelly was not a member of the alleged conspiracy, rather he was the conspiracy's first victim, terminated for analogous reasons three months earlier.

Respectfully submitted,

September 8, 1998

DENNIS J. KELLY, PRO SE

DENNIS J. KELLY 08817-021
FCC COLEMAN LOW A-2
P.O. BOX 579
COLEMAN, FL 33521

Certificate of Service

I, Hennis J. Kelly, have served this day a copy of this Adoption of Brief of Amicus Curiae National Whistleblowers Center By Respondent Kelly to the listed attorneys by placing same, postage paid, in the prison receptacle for the U.S. Mails.

David E. Hudson
801 Broad St., 7th Floor
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Charles C. Stebbins
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Stephen M. Kohn
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This 8th day of September, 1998.

Hennis J. Kelly

Hennis J. Kelly 08817-021
P.O. Box 879 LA-2
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Coleman, FL 33521

September 8, 1998

Clerk of Court
United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

Dear Clerk of Court:

RE: Haddle v. Garrison, et al
97-1472

Pliase find enclosed the Adoption of Brief of Amicus Curiae National Whistleblowers Center By Respondent Hennis Kelly, and the Certificate of Service for same. Would you please file this Adoption on my behalf and return a stamped copy to me at the enclosed address. Thank you for your assistance in this matter.

Sincerely,
Hennis J. Kelly

P.O. Box 879 LA-2
Coleman, FL 33521

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